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THE
PAROCHIAL ECCLESIASTICAL
LAW OF SCOTLAND

THE
PAROCHIAL ECCLESIASTICAL
LAW OF SCOTLAND

AS MODIFIED BY

THE CHURCH OF SCOTLAND ACTS,
1921 AND 1925.

BY

WILLIAM GEORGE BLACK,
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AND

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FOURTH EDITION.

Revised and Enlarged.

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PREFACE.

THE lapse of twenty-six years since the issue in 1901 of the last (third) edition of this book, with the progressive development (or, at least, illustration) of the law in decided cases, and its incidental modification in minor points by statute in the interval, would have explained—if it would not, indeed, have called for—the issue of a new edition, quite apart from the fundamental changes in the whole branch of the Law of which it treats which are involved in the passing of the Church of Scotland Act, 1921, and the Church of Scotland (Property and Endowments) Act, 1925. And, but for the known imminence of the legislation embodied in these Acts, a fourth edition would probably have been offered ere this.

Now that these Acts have become law, it is obvious that for any treatise on the Parochial Ecclesiastical Law of Scotland which aspires to permanent usefulness, the issue of a new edition is a matter no longer of choice, but of necessity.

The very circumstances, however, which thus rendered the issue of a new edition necessary greatly enhanced the difficulties attendant on its preparation and on the determination of its form. Normally it is an easy matter to incorporate those few and gradual changes in the law which the progress of time ordinarily brings about. But the two Acts referred to will result, when their provisions have attained full fruition, in a complete reconstruction, rather than in a mere development, of the Parochial Ecclesiastical Law of Scotland—a reconstruction in the course of which many of the salient features of the past will be found to have disappeared, and others to have lost much of their significance. For the Church of Scotland Act of 1921 gives legislative recognition in

Far-reaching effect of the Church of Scotland Acts of 1921 and 1925 on Parochial Ecclesiastical Law

sec. 1 to a canon of construction which may be found largely to subvert those canons on which many of the leading cases of the last century rested. By the fourth of the Declaratory Articles (now adopted as part of the constitution of the Church), the rights and powers of the Church are expressly declared to include the right to determine all questions of membership and office in the Church, *the constitution and membership of its Courts* and the mode of election of its office-bearers, and *to define the boundaries of the spheres of labour of its ministers and office-bearers*. The full exercise of these powers cannot co-exist with the continuance of the machinery which has hitherto controlled the erection, disjunction, &c., of parishes; and all statutes and laws heretofore in force are, by sec. 1 of the Act, repealed in so far as they are inconsistent with the Declaratory Articles.

As for the Act of 1925, it may fairly be claimed that it seems likely to achieve with wonderful completeness the object intended by its promoters, viz., that when its provisions have become fully operative they will result in the Church holding endowments in the form of investments or definite charges on land—yielding an annual revenue to the Church as they would to any other holder—with which endowments and revenue the Church is to be free itself to deal (untrammelled by control of the civil Courts), within the limits only of its own constitution, as that is recognised in the Act of 1921.

In view of this, it may very plausibly be thought that much of our hitherto existing Parochial Ecclesiastical Law is obsolescent, and that its place will shortly be taken by a comprehensive and detailed statutory code in which little of the older structure will be retained.

Under these circumstances, the planning of a new edition of a work in which the older system had been somewhat fully dealt with in its historical setting has

its difficulties. On the one hand, the method might be adopted of bringing the former text up to date by stating the modifications arising through decisions and minor legislative interferences, and merely noting the points in which the new statutory code departs from the former law, leaving the statutes of 1921 and 1925 to be themselves consulted by those desiring to know what has taken its place. On the other hand, all that has been superseded by reason of the new legislation might have been jettisoned, and the book made a mere exposition of Parochial Ecclesiastical Law as it will survive under the statutory code.

But neither of these methods of treatment would entitle the resulting work to be regarded (as it is desired that it should be regarded) as a reasonably complete presentation of Parochial Ecclesiastical Law as it exists and is operative in Scotland for the time being. For, radical as are the changes introduced by the Church of Scotland (Property and Endowments) Act, few of these have taken such immediate effect as at once to supersede the existing law. Many of them in their inception, and all of them in their full results, will only take effect after an interval (more or less prolonged) during which the system which is in course of being superseded will continue in being, and must be reckoned with. Further—remote as the new arrangements introduced by the Acts of 1921 and 1925 are from those which have hitherto regulated the various matters to which they relate—the ascertainment and definition of the former must be governed at every step by reference to the latter. So that for many years yet it will be impossible for the practitioner to treat the older law as negligible.

Giving due effect to these considerations, it has been thought proper to retain most of the text of the former editions, modifying this as is required to give effect to the decisions of the last twenty-six years; and with regard to each aspect dealt with to point out

does not
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the existing
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Bearing of
this on
method of
treatment.

after the statement of the common law the way in which this has been effected by the new legislation, with such an amount of exposition as will sufficiently indicate to those interested the general nature of the changes made, adding references to the relevant sections of the Act of 1925—the full text of which will be found printed in the Appendix.

Considerations at once of convenience and consistency have, however, led to the omission in one case from, and in another to the restriction of the treatment in, the present volume of two subjects which were dealt with at length in what formed Parts IV. and V. of the last edition.

Omission of detailed consideration of laws relative to Voluntary or Dissenting churches.

In that edition an attempt was made to give a brief account of the position in law of Dissenting or Voluntary churches in Scotland. It was, however, acknowledged that it was impossible within the limits available to deal with all the decisions given by the Courts relative to Dissenting churches in a country where dissent, (or rather secession,) has been so frequent and so persistent; and the chapter was confessedly no more than an attempt to gather for reference some of the leading judgments which had up to that time been pronounced with reference to salient points of practical interest in regard to these churches. Even to that limited extent the attempt involved an excursion beyond the strict limits of a work on Parochial Ecclesiastical Law. For neither legislation nor case law as to Dissenting churches falls within the description of "parochial." And in a country in which non-Established churches have so flourished as they have in Scotland, it is remarkable that such law as there is concerning them (and there have been very many cases dealing with such churches) hardly falls even within the chapter of law to which the heading "Ecclesiastical" is appropriate.

This being, strictly speaking, neither "parochial" nor "ecclesiastical."

Time was indeed when there was a certain body of statutory law affecting these churches which did

deal with them as claiming to be churches or ecclesiastical units. But this legislation was primarily of a restrictive description directed against the Roman Catholic and Episcopal Communions; and in modern times it is represented only by its counterpart, the legislation relaxing the restrictions which were formerly imposed upon them. Of this legislation the latest example is to be found in The Roman Catholic Relief Act, 1926 (16 & 17 Geo. V. c. 55), which removes practically the last vestige of restraint imposed by legislation upon the activities of the Roman Catholic Church. The result of this gradual and ultimately complete relaxation of legislative restriction has, however, been merely to render more accurate the general statement that the law of Scotland applicable to dissenting religious bodies finds its appropriate place under chapters of the law other than that to which the heading "Ecclesiastical" applies.

The treatment by the Courts of the affairs of non-Established churches seems indeed consistently to have been inspired by the spirit of the old Act of 1579, c. 7, [69], which declared "That there is none other face of kirk nor any other face of religion than is presently by the favour of God established within this realm, and that there be no other jurisdiction ecclesiastical acknowledged within this realm." If, therefore, a non-Established body calling itself a Church wants to seek redress in the Courts of the land, it has hitherto seemed to our judges that it must find the ground for it upon some other basis than its recognition as a "kirk." Witness the refusal of the Court in *Wilson v. Jobson*, 1771, M. 14555, to allow the parties to describe themselves as a "congregation subject to the Associate Synod"; and in *Drummond v. Farquhar*, 6th July, 1809, F.C., to permit the use in process of the title of "Bishop" of the Episcopal congregations in Scotland. The result of this spirit was that the law protective of the property of these

Common law inhospitable to conception of diverse churches recognised as such by law.

churches, as it developed, truly falls within that chapter of law which deals with the law of trusts; while that regulating the personal rights of the members of non-Established churches is gathered from that branch of the law of contract which governs the contractual rights of voluntary associations. And it necessarily followed, from the denial,—in the passage quoted from the Act of 1579, c. 7, [69],—of any other “jurisdictions ecclesiastical” than those of the kirk that the foundation for the recognition to any extent of the decisions of the so-called Courts of the Voluntary churches, even as affecting their own members, must be arrived at through the medium of the same chapter of law. How strongly the conceptions of the Act of 1579, c. 7, constrain to this result is shown by the circumstance that when Lord Ardmillan—(perhaps in this respect the most liberal-minded of the judges of last generation)—desired to find a pretext for the Courts aiding the voluntarily constituted judicatory of a non-Established church to secure the attendance of witnesses, he justified the interposition of the Civil Court by the analogy of the aid which it would give to any other contractually constituted judge, and referred to the analogy of arbitration (*Presbytery of Lews v. Fraser*, 1874, 1 R. 888, at 894).

These considerations show that consistency quite justifies the exclusion of the law affecting non-Established churches from treatment as not being heretofore within the sphere of parochial ecclesiastical law, and it is too soon yet for any useful speculation as to how far this situation may have been affected by the declaration in sec. 3 of the Act of 1921 that “nothing contained in this Act or in any other Act affecting the Church of Scotland shall prejudice the recognition of any other Church in Scotland *as a Christian Church protected by law* in the exercise of its spiritual jurisdiction.”

Convenience, too, points to the same conclusion as does consistency. For, confessedly, the treatment of

the subject in the last edition was but sketchy. And since then the whole basis of the law affecting the non-Established churches in regard to their property and powers over their confessions has been canvassed, crystallised, and developed in the Free Church cases (*Free Church of Scotland v. Lord Overtoun*, 1904, 7 F. (H.L.) 1; 1904 A.C. 315, and separate Report, "The Free Church of Scotland Appeals," 1903-1904, by R. L. Orr, Esq., K.C., published by Macniven & Wallace, 1904); and in cases following upon these, *e.g.*, *Ness v. Miller*, 1912, 2 S.L.T. 263; and *Anderson's Trustees v. Scott*, 1914 S.C. 942. Lord Skerrington's masterly judgment in the last of these cases emphasises the identity of the ratio of the protection accorded to the property of a dissenting church with that of the protection accorded to any other trust for public purposes. These cases, and in particular the Free Church cases, have led to the theoretical basis of the legal position of non-Established churches being canvassed, both in the decisions themselves and in resulting literature, to such an extent that any worthy exposition of the subject would necessarily claim a much more extended space than that accorded to it in the last edition. Indeed any space which could possibly be accorded to it in a work principally devoted to parochial ecclesiastical law would entirely fail to do it justice. On the other hand, the necessity of dealing with the course of recent legislation upon those matters which are properly germane to this work has necessarily claimed a much larger amount of space than was required in previous editions. It seems proper, therefore, to obtain the required scope for the treatment of what is within the appropriate limits of the title by foregoing dealing with a subject which, though related to the main theme, yet depends upon essentially different legal considerations. The authors have felt the more ready to adopt this view inasmuch as from the cases just cited and from that of *Skerret v. Oliver*, 1896, 23 R. 468, it is possible to gain a

Cases regard-
ing these
churches
and their
property be-
long to other
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law—contract
or trust—

and cannot
conveniently
be properly
treated here.

pretty succinct working conception of the principles regulating the property and personal rights of members of non-Established churches in the eye of the law; while for those who desire to pursue the subject more thoroughly the late Mr. Taylor Innes' work on the Law of Creeds in Scotland deals with the whole subject with a thoroughness quite unattainable in anything other than a work specially devoted to the particular subject. For these reasons the chapter on "Dissenting Churches," which forms Part IV. of the last edition, has been entirely omitted from the present volume.

Historical
account
of tithes
abridged in
this edition

Part V. of that edition consisted of "A Notice of the History of Tithes in Scotland," which contained a detailed study of Tithes from their institution in Europe, and their development in England and elsewhere, and more particularly in Scotland, down to the present time. At the time of publication of that edition the institution of teinds as then existing was still closely bound up with the system of Scottish parochial ecclesiastical law, of which indeed it formed no inconsiderable part. But when the provisions of recent legislation have been fully wrought out, tithes will practically cease to stand in any special relation to parochial, or even to ecclesiastical, law. They will remain merely as a particular estate in land the origin of which was indeed ecclesiastical, but which, where it still exists as a separate estate, will for the future be merely a sum payable to a titular, who will not be (unless accidentally) an ecclesiastic, and whose enjoyment of the estate will no longer be qualified by any reference to duties towards the Church. In these circumstances it has been thought desirable, (again having in view the space required for treatment of the changes made by recent legislation,) greatly to abbreviate the treatment of the subject of tithes. This has been done by omitting much of the historical matter given in the last edition, and by confining the notice of the subject

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lative changes
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to a brief account of the position of tithes at the present day, or, rather, immediately prior to the passing of the Property and Endowments Act of 1925, adding an exposition of the changes made by the provisions of that Act. This can be done the more conveniently as within the last few years the historical basis of the law of teinds, so far as bearing upon modern ecclesiastical rights, has been canvassed and illustrated in several leading cases, namely, *Baird v. Lord Wemyss* (Haddington), 1906, 8 F. 669; *Davidson v. Stuart* (Kirkton), 1919 S.C. 20; *Galloway v. Earl of Minto* (Minto), 1920 S.C. 354, and 1922 S.C. (H.L.) 24; and *M'Ewen v. Watt* (Polwarth), 1922 S.C. 203. In particular, in the erudite judgment of Lord Sands in the Court of Session stage of *Galloway v. Earl of Minto*, and in Lord Dunedin's observations in the same case in the House of Lords, the student will find crystallised such history as is necessary for an understanding of the position of teinds so far as now practically important.

The issue of this new edition has been longer delayed than was either desired or anticipated by its authors, largely owing to the extent to which the time of one of them has been occupied by the duty of taking part as one of the General Trustees of the Church in the work of helping to initiate the practical administration of the Act of 1925. Any slight disadvantage which may attach to this delay will, it is hoped, be more than compensated for by the opportunity afforded of seeing the Act in operation, and of observing the problems to which it is likely to give rise.

The authors desire to acknowledge with thanks the assistance kindly rendered to them by Mr. James A. R. Mackinnon, advocate, in noting recent decisions in the Sheriff Courts bearing on the subject, and otherwise.

WILLIAM GEORGE BLACK.
J. ROBERTON CHRISTIE.

May, 1928.

FROM THE
PREFACE TO THE FIRST EDITION.

THE purpose of this book is to state as concisely as possible the existing Ecclesiastical Law affecting Scottish parishes.

The arrangement of subjects is not one hitherto adopted, but I have had in view the special purpose of the work. It is the law of the parish in its ecclesiastical aspects, and not either general parochial law or general ecclesiastical law of which a summary has been attempted. The constitution of the parish is therefore followed by consideration of the responsibilities of the heritors, who are the civil authorities of the ecclesiastical parish. The matters of which they have charge, or for which they have had originally to provide, such as church building and repairing, churchyards, manses, and glebes, are then treated. The strictly ecclesiastical authorities form the subject of the succeeding chapters which deal with the minister, kirk-session, and Presbyterian jurisdiction in parochial ecclesiastical affairs.

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By the Act of 1592, c. 114, the Church of Scotland was established on a Presbyterian basis, with its four constitutional Courts, the Kirk-Session, Presbytery, Synod, and General Assembly. The Presbyterian establishment, however, did little to alter the existing Parochial Ecclesiastical Law, and to this day the groundwork of parish law is the law of the Church prior to 1592. It would be an instructive and interesting task to show how essentially the main features of that law have been preserved, but in the present work I have not felt myself justified in enter-

[See Geo. V.,
1592, c. 8
[114], in
Alexander's
Abridgement
of Scots Acts,
p. 103.]

ing upon this subject; of its importance to every one who has professionally or otherwise to inquire into modern parochial law there can be no question.

WILLIAM GEORGE BLACK.

88 WEST REGENT STREET,
GLASGOW, Nov., 1887.

[NOTE.—A very full account of the historical development of the Presbyterian Establishment from the Reformation to the Union, as well as of the relation of the non-Established Churches to the law, will be found in the papers in the “Free Church Case,” *Bannatyne and Others v. Lord Overtoun and Others*, 1904, and in the very full summary of these in the report of the case in L.R. (1904) A.C. 515.]

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PAROCHIAL ECCLESIASTICAL LAW OF SCOTLAND.

PART I.

CHAPTER I.

THE PARISH.

THE word PARISH is derived through the Middle-English *parische* from the French *paroisse*, which is again derived from the Latin *paræcia*, springing from the Greek *παροικία* = a neighbourhood (Gk. *πάροικο*, neighbouring; Gk. *παρά*, near; *οικος*, house, abode (Skeat)). It has not, therefore, primarily any ecclesiastical meaning; it describes a district or division. But it seems that, in Scotland at least, until comparatively recent times, "the parish" was a purely ecclesiastical area. "It is only of comparatively recent date that other public interests came to be regulated by parish boundaries" (per Lord Kinnear in *Meacher v. Blair-Oliphant*, 1913 S.C. 417, at p. 436). From its use to indicate a district allocated to and benefiting by the services of a particular chapel or religious house, the word took its present meaning of an ecclesiastical district, the unit of ecclesiastical local government.

It has been asserted that Rome was virtually divided into parishes by the end of the third century; but such parishes, if they existed, did not correspond to the definition given above.¹ It is probably not

Parish:
derivation
of term.

Evolution of
the parish
in the Roman
Church.

¹ We learn, indeed, from the "Liber Pontificalis" that Anacletus, the third Pope, appointed twenty-five priests to serve churches (*tituli*—read by some as meaning "stone altars," but probably preferably

inaccurate to say that prior to the Peace of the Church, in 313, while there may have been pastoral superintendence over delimited areas *quoad sacra*, there were no "parishes" in the sense of the definition of parish which has just been given.

The first ecclesiastical unit was the diocese, or, perhaps more correctly, the bishop;—for the bishop existed before his diocese. So far as Europe was concerned, the Christian religion followed the Roman camp. When the camp became the city, there the bishop was to be found; there was his church; and around the church were his clergy.² We must remember that originally the term *parochia* was applied to the diocese, the diocese being the parish. It was only in the sixth century that the word which had meant a diocese came, at least in Gaul, to mean something that (whatever it was) was not a bishop's diocese.

In Western
Europe.

It would not be consistent with the scope of this book to enter into any detailed recital of the steps by which, in Rome, in Western Europe, and in these islands there was evolved from the *parochia*, which was coextensive with the bishop's sphere of oversight, the PARISH which became at once the primary ecclesiastical unit and the fiscal unit of the local government. It is enough to say that it appears

derived from *titulus*, a boundary stone) in special districts. Evaristus, the fifth Pope, made similar appointments; and Marcellus, in 308, "established 25 *tituli* in the city of Rome as dioceses for baptism and reception of penitents . . . and for the" (care of the) "burial places of the martyrs" (cf. "Rome of the Pilgrims and Martyrs," by Miss Ethel Ross Barker. Lond., 1913, p. 12.). Miss Barker has made out a list of early *tituli*, paralleled with that of the secular divisions of the city into fourteen regions. But this does not satisfactorily establish that the *tituli* in any material respects corresponded to the parishes of mediæval or modern times. The *tituli* were far from being coterminous with the regions. They were usually clustered together in districts remote from the heart of Rome, there being, *e.g.*, no *titulus* either in the region of the Forum or in that of the Palatine.

² A modern analogy to this state of things may be found in some missions, particularly in India and Africa. The leading missionary is established at the seat of the church, and is assisted by many lay brothers who go abroad into the bazaars and throughout the villages around to spread among the people the instruction learned by them in the church.

that in Western Europe—while the development of ecclesiastical local units was in some measure due to the growth of Christianity in towns subject to Roman government and in some measure to the very opposite cause (the gathering of dwellers in distant places round the cell of a hermit or the place where he had dwelt, or to the presence of a monastic fraternity)—the rural parish was in itself in origin essentially civil rather than religious. For in the case of agricultural communities, its basis was the villa or manor, and in communities originally pastoral or migratory, the tribe or clan, or family or sept of such tribe or clan. As each such group settled itself in a known and fixed place the parish came to be evolved. In the word “parish,” therefore, we have not only the whole history of the Christian Church as a recognised and localised religious organisation in Europe, but a very early glimpse of the civil divisions of our most remote forefathers—these divisions being, as regards Scotland, *patrimonial* in the more Saxon portions and *tribal* in the Celtic portions. The necessary evidence to support this conclusion as comprehensively as one could wish in relation to the development of parishes is as yet matter for further prolonged and careful investigation.

In approaching the very difficult and obscure question of the origin and development of the parish in Scotland, we have only one solid fact from which to start, viz., that religion came to Scotland by way of monastic missionaries. We have to picture to ourselves a land with many rulers, the boundaries of whose kingdoms—if “kingdom” is not too dignified a name—were very uncertain, and the succession to whose crowns was determined by other rules than ours. PARISHES as defined in the introductory paragraphs of this chapter were non-existent when Malcolm Canmore married Margaret, sister of the Ætheling Edgar, in 1068.

Origin of
the parish in
Scotland.

Emergence
of "lay
benefices."

Although non-parochial, the Scottish Church was far from being unendowed. But it was very hard for isolated settlements of monks to retain civil independence; and the existence of what we know as "lay benefices" or, in other words, Church endowments owned by laymen, was recognised. It is not necessary to hold that such benefices originated in all cases in the appropriations of greedy nobles. Just as the freeman, both on the Continent and at home, found it sometimes best for his own protection to surrender his freedom and become nominally a serf to a strong protector, so the Churchmen of the Celts may have shown wisdom in recognising a civil overlord.

Early
parishes.

The first parish in Scotland is believed to have been that of Ednam, in Roxburghshire, created in 1105 by Thor the Long, who in his charter of it recites the gift to him by his Lord Edgar, King of the Scots, of Aednaham (Ednam), "a desert land which I have rendered habitable with his assistance and at my own cost. I have built a church to the honour of St. Cuthbert, and bestowed it upon St. Cuthbert and his monks to be possessed for ever, with one ploughgate" (say, 104 acres) "of land." Then follows the recital of the pious considerations which induced the gift. But at this time, and for long afterwards, the term "parish" continued in Scotland as in England generally to mean "diocese." Thus, in the inquest of David, when Prince of Cumbria, concerning the early possessions of the Church of Glasgow, of date about 1115 to 1124, we find that the diocese of Cumbria is referred to as "parochia." The parish of Glasgow, properly so-called, is the historical survival of that See of Cumbria.

Parochial
organisation
follows on
increase in
number of
bishoprics.

In Scotland, at the beginning of the twelfth century, there was only one bishopric, that of the "Episcopus Scottorum," situated at St. Andrews. But by the end of that century (Dowden, *Chartulary of Lindores*, xiii.), the entire country was subdivided

into eleven effective bishoprics. Following close on the erection of these early bishoprics came, says Dr. Dowden, "the establishment of the parochial system, hitherto unknown, with its grouping of parishes for disciplinary purposes into archdeaconries and 'deaneries of Christianity.' Before the close of the twelfth century the organisation of the Scottish Church and its secular clergy was indistinguishable, save for the lack of a metropolitan, from that of the Church of England" (*ibid.* xiv.).

From narratives such as those contained in the Chartulary of Lindores (commencing *circa* 1188) and the Chartulary of Inchaffray (commencing *circa* 1190) much of interest may be learned with regard to the early development of parishes in Scotland. The word "*parochia*" was not always in use; but the church at Lindores, for example, was a church with land already pertaining to it, and probably with more or less definite territorial determination for ecclesiastical purposes. But such churches were in the gift of the dominant landowner. Not that he was their owner, but he could donate them where he pleased, subject to the consent, in form at least, of the bishop in whose diocese the church was situated. So long as there was only the one "*episcopus Scottorum*," it is not likely that episcopal sanction had much to do either with the creation of parishes or with their transference. In the middle of the thirteenth century a litigation, carried on by William Mydford, vicar of St. Mary's, Dundee (carried to Rome by appeal), sheds interesting light on the division of the revenues of the Church between the vicar (the presentee) and the parent house of Lindores.

By the period to which this litigation belongs, the words "*parochia et parochiana*" were used much in their present sense. The district of a mother church—Selborne calls it "*sub-diocese*"—was known sometimes as "*Plebania*," but perhaps was more correctly described as a "*mensal barony*." Of this kind, says

Evidence
from early
Chartularies.

Cosmo Innes, was Stobo, with its four subordinate parishes of Broughton, Dawig, Drummelier, and Tweedsmuir, where the parson was styled "dean," "and was, it would seem, in very early times hereditary."

Position immediately prior to the Reformation.

By 1560 no part of Scotland was admittedly extra-parochial; it was all parcelled out into parishes, each of which was in its conception a district included within ascertained boundaries, and allocated to a particular church, the inhabitants of which district were in theory entitled to claim the spiritual superintendence of its minister, and were, on the other hand, bound to contribute through their representatives, the landowners of the district, to his maintenance and that of the church and "manse" of the incumbent. But it seems probable that when great areas of country were served by one kirk the parochial demarcation was more official than real.

Post-Reformation legislation as to parishes.

When the Reformation shook the religious system of Scotland to the heart, the State intervened to secure continuity of religious ordinances. The Act 1551, c. 100, provided that every parish church and such places within bounds "as sall be found to be a sufficient and competent Parochin theirfoir" should have their "awin pastour" with reasonable stipends; and subsequent Acts provided for parishes erected thereafter. From 1617 to 1707 alterations of parish boundaries and the formation of new parishes were effected by decrees of parliamentary commissioners (who are now represented by the Judges of the Court of Session as Teind Commissioners). The Church as a body has never hitherto had authority in these matters either in Roman Catholic or Protestant times. In the *Auchtergaven* case two parishes had been united in 1617, with one minister. The bishop afterwards, with consent of the Presbytery, gave a minister to each church, dividing the stipend, but, later, again united the charges, giving Mr. Chrystison the united charge. The other clergyman, Mr. Anderson, competing with him for the stipend, the Court

Functions of Commissioners.

decided in favour of Chrystison, because a “ kirk so united by Parliament could not be loosed, disunited, or altered by the bishop, nor no other, but by the Parliament ” (*Chrystison v. Anderson*, 1631, Mor. 7946).

In 1617, c. 3,³ a commission was appointed to provide for a proper stipend for ministers in parishes where the stipend did not amount to 500 merks Scots, or five chalders of victual, besides manse and glebe. The commissioners had power “ to unite sik kirks [*i.e.*, parishes] ane or moe as may conveniently be unite, where the fruits of any one alone will not suffice to entertain ane minister.” By the Act 1621, c. 5,⁴ another commission was appointed with similar objects as to the plantation of kirks and stipend, and with power “ to disunite such kirkes one or moe, as were united of before, and appointed to be served by one minister,” and to “ appoint the same to be served by several functions and charges as distinct parochins.” Subsequent commissions, or commissioners, continued under Acts of the years 1627, 1633, 1641, 1644, 1647, 1649, 1661, 1663, 1672, 1685, 1686, 1690, and 1693, were empowered to deal with such subjects as the too great extent of some parishes, the union of small parishes, and the provision for new churches where necessary. An enumeration of the provisions of the various Acts is unnecessary. By Act 1707, c. 10,⁵ the Lords of Council and Session, as commissioners for planting churches and valuing teinds, took up the functions of the parliamentary commissioners under previous Acts, and have since exercised the power of erecting (or creating) or uniting parishes and of disjoining and annexing lands; but the alteration of parochial boundaries has since 1844 been effected by the Court under the Act 7 & 8 Vict. c. 44. The Court had power under this Act, with the consent of a majority in value of the heritors of the parish, to erect new churches and disjoin parishes as aftermentioned.

Superseded
in 1707 by
Lords of
Council and
Session as
permanent
Commis-
sioners.

³ Alexander's Abridgement, p. 143. ⁴ *Ibid.*, p. 158. ⁵ *Ibid.*, p. 433.

Formally these powers possibly remain notwithstanding the enactment of the Church of Scotland Act, 1921 (11 & 12 Geo. V. c. 29), and the Church of Scotland (Property and Endowments) Act, 1925 (15 Geo. V. c. 33); but, as is hereinafter explained, the powers, so far as relating to parishes *quoad omnia*, will practically be inoperative, and those in regard to parishes *quoad sacra* can hardly (consistently with the provisions of these Acts)⁶ be exercised otherwise than merely administratively, so as to give formal effect to the decisions of the Church through its General Assembly.

I. COMMON AND EARLIER STATUTORY LAW.

Classification
of parishes.

Parishes in Scotland are distinguished (A) according to the nature of the area of which they consist, as (1) LANDWARD=rural; (2) BURGHAL=within burgh entirely; and (3) BURGHAL-LANDWARD=such as contain both burghal and rural portions—the order of the component parts of the compound name being sometimes inverted where the rural part predominates; and (B) according to the purpose for which they are erected, as (1) *quoad omnia*, *quoad sacra et civilia*,—for civil as well as ecclesiastical purposes; and *quoad sacra tantum*—for ecclesiastical purposes only.

Landward
parish.

Considered under the first head of division, a LANDWARD PARISH is a rural parish, either food producing or adapted, pastorally or agriculturally, to be so. If teinds are payable from a district, this is indicative that it is, or formerly was, a landward as opposed to a burghal parish. (See *Auld v. Magistrates of Ayr*, 1828, 6 S. 1087, at 1093.) If the lands within a parish appear on the cess-book of the county in which the parish is situated, this fact indicates that the parish is landward; for had it been

⁶ Cf. 11 & 12 Geo. V. c. 29, Schedule, sec. iii., and 15 Geo. V. c. 33, sec. 34, &c.

within a royal burgh, the lands would not be entered on the county cess-roll but upon the stent-roll of the burgh. At the same time, the test is not a final one; for the burgh might be one of barony or regality, or a police burgh. Or the lands might be held in feu by a burgh-royal, though lying outside the burgh, as in the case of the parish of Ayr, which, besides the ancient burgh liberty, held, in the time of William the Lion, a tract of ground, the Borrowfield, in feu. In 1236, Alexander II. granted to the burgh of Ayr the lands of Alloway, which comprised the old landward parish of Alloway. In 1691 this anomalous state of things was got rid of by the erection of the two parishes of Ayr and Alloway into one parish—the modern parish of Ayr (see case, *supra*).⁷ In a landward parish the minister is entitled to a manse and glebe.

A burghal parish is a parish the territory of which was the territory of a burgh, or was contained within the boundaries of a burgh. Whether the burgh is a royal burgh or a burgh of regality or of barony is of no consequence. It is probable, though the point has not been raised, that the formation of a police burgh, under the General Police Act of 1862, also would cause a parish to be regarded as burghal, the main use of the term now being to denote that the parish area is used exclusively or mainly as the site of dwellings, or of shops and manufactories. A “burrowstoun kirk” is the church of a burghal parish with no landward district attached to it. (See *Auld v. Magistrates of Ayr*, per L. J.-C. Boyle, 6 S., at p. 1090, *supra*.) The minister of a burghal parish is not entitled to a manse.

A BURGHAL-LANDWARD parish is a parish partly burghal, partly rural, where the former element predominates. When the rural territory is considerably the more important in extent or value, the term

⁷ See also *Gairdner v. Ayr Kirk-Session*. Sheriff Court, Ayr, A. 94, 1911 (unreported).

landward-burghal is sometimes used. In former times a burghal parish might become a burghal-landward parish, in consequence of a grant to a burgh of a rural district situated outside the burgh's liberty; in modern times a rural parish becomes burghal-landward by the growth of a town or large village, and the formation of a police burgh within it. The minister of a burghal-landward parish is entitled to a manse and glebe (*Auld v. Magistrates of Ayr, supra*).

Powers of the
Teind Court
relating to
parishes.

The following are the powers of the Teind Court under the Acts 1707, c. 10; 7 & 8 Vict. c. 44; 31 & 32 Vict. c. 30, and 39 & 40 Vict. c. 11, as these existed as at the passing of the Act of 1925 (15 Geo. V. c. 33) as to parochial alterations:—

- (1) To unite parishes.
- (2) To disjoin and erect new parishes.
- (3) To disjoin and annex lands to other parishes.
- (4) To disjoin and erect districts into parishes *quoad sacra*.
- (5) To erect Gaelic churches and congregations into parishes *sine territorio*.
- (6) To disjoin and erect districts attached to additional churches under 4 Geo. IV. c. 79 and 5 Geo. IV. c. 90 into parishes *quoad sacra*.
- (7) To disjoin and erect districts under 5 Geo. IV. c. 90 into parishes *quoad omnia*; and
- (8) To disjoin and erect districts *quoad sacra* out of united parishes.

United
parishes:
effect of
union.

When two parishes have been united by decree of the Teind Court, their separate existence ends. The minister of the parish is minister not of two united parishes, but of one parish. There can, as a rule, be but one church and one manse. If both cures are full at the time of the union, it may be provided in the decree either—(a) that the decree is not to be operative until one of the cures becomes vacant; or (b) that both ministers are to draw their accustomed

stipend until one of the cures becomes vacant. The more suitable of the existing churches and manse is generally selected and designated as the church and manse of the united parish; but an entirely new church and a new manse and glebe may be rendered necessary by circumstances. The disuse of existing graveyards is not countenanced. As a rule, the heritors of a united parish are benefited by the union, as there is only one church and one manse to maintain. The minister receives the united stipend.

In proceedings regarding erections or alterations of parishes, where a course of procedure has followed upon the public act of an administrative body of great authority the records of whose administration have been wholly lost, the presumption of law is *omnia rite et solemniter acta fuisse*. Thus, in an action raised in 1898 at the instance of a Presbytery against the heritors of two parishes to have it declared that the parishes had never been legally united, it appeared in course of the action that, while there was no record extant of any decree of union, there had been from 1617 onwards a consistent course of administration founded on the basis of a union by the commissioners under the Act 1617, c. 3; that the union was asserted in Crown writs in 1619 and 1621, and by Acts of Parliament; and that the union had been accepted and acted on by the Crown, the Church Courts, and the Court of Teinds for nearly three hundred years. The Court held (1) that the presumption was that the parishes had been legally united, and that the onus was on the pursuers to prove that there had not been a legal union, and (2) that on the evidence they had failed to discharge the onus (*Presbytery of Stirling v. Heritors of Larbert and Dunipace*, 1902, 4 F. 1048).

Where a decree of the Court of Teinds, in 1670, united two kirks under the minister of one of them, who was to serve the cure at both kirks Sunday about,

but declared the parishioners of each parish free of the support of the church in the other parish, it was held, in 1880, that the heritors in one of the original parishes were not liable for the repair of the church of the other parish, though they were liable for that of the manse and other buildings (*Magistrates of Fortrose, &c. v. Maclellan* (Collector of Rosemarkie), 1880, 8 R. 124).

In an application by petition by *The Presbytery of Kirkwall*, 1921 S.C. 448; 1 S.L.T. 313, the Court of Teinds united the first and second charges of a parish *quoad omnia*; and similarly on a petition by *Blythswood Parish Church Trustees* (1920 S.C. 654; 2 S.L.T. 164) the *quoad sacra* parishes of Blythswood and St. Matthews, Glasgow, were united.

A union of two or more parishes leaves the civil status of the parishioners as it was previous to the union.

Disjunction
and erection.

A new parish might be formed out of an existing parish, if the mother parish was too large or too populous, by *parochial disjunction and erection* (1707, c. 10; 7 & 8 Vict. c. 44), the new cure being independent of the mother parish either in part or wholly. In the former case the decree of the Court of Teinds bore that the stipend of the old parish was in part to be paid out of the teinds of the disjoined lands, and the incumbent of the new parish would derive stipend from the teinds of the new parish only so far as the decree of modification in favour of the minister of the old parish should permit (*Comm. Agt. in Locality of Abbotshall v. Martin*, Nov. 22, 1815, F.C.). In the latter case (the more usual) the parochial burdens imposed on parishioners or heritors were transferred. The minimum consent requisite for such disjunction and erection was that of the majority of the heritors, according to valuation. This consent might be dispensed with if already there were in the lands about to be disjoined and erected a church or place of worship suitable for the church of the new parish, and

capable of being lawfully appropriated to that purpose, thus saving the heritors the expense of erecting a new church. In such a case if the titulars or others having right to the teinds out of which was to be paid not less than three-fourths of the additional stipend or stipends to be modified in consequence of the disjunction had consented to it, or stated no objection, after due intimation by direction of the Court made to them, then the Court might allow the process to proceed, and give decree (7 & 8 Vict. c. 44, sec. 4). As matter of practice, the consent of the titulars does not seem to have been treated as an essential formality (see *Campbell v. Officers of State*, 1864, 3 M. 295). On the other hand, although all the heritors might consent to and desire a disjunction and the erection of a new parish, the Court held itself free to give effect to the objections of titulars (case of *Calder Heritors v. Glasgow College*, 1743; Connell on Parishes, 78).

Objections to such an erection might and (subject, however, to the effect of the Church of Scotland Act, 1921, and the Church of Scotland (Property and Endowments) Act, 1925) possibly still may be—

- (1) That the new district is too thickly populated for one additional church.
- (2) That the free teind of the district is not sufficient to maintain suitably the minister of the new church.
- (3) That the site of the church is inconvenient, or that the church is insufficient in size.

These objections are still in substance valid and appropriate for consideration in any process of disjunction and erection. But it appears unlikely that if the Court has still any jurisdiction even formally left to it in the matter it would now regard itself as entitled to give effect to such objections adversely to the considered view of the Church itself upon them. To do so would be inconsistent with the right recognised under the Act of 1921 (11 & 12 Geo. V. c. 29) (Schedule, Art. iv.), as vested in the Church “to

Effect of Acts of 1921 and 1925 on powers of the Court in regard to these matters.

define the boundaries of the spheres of labour of its ministers." And in the only class of case in which there is any likelihood of the Court being in practice resorted to administratively for a disjunction and erection—that of a parish *quoad sacra*—any action by the Court adverse to the views of the Church would also seem to be inconsistent with the wide powers given to the Church in regard to such new parishes by the Act of 1925. (15 Geo. V. c. 33), sec. 34 (2). In regard to the cognate matter of suppression of a charge or the uniting of a parish with another parish, the General Assembly, having in view the conditions which will arise on the completion of the Union of the Churches which is in contemplation, has already taken action which implies that it regards the Church as fully competent to deal with these matters without even formal resort to the Court of Teinds. By Interim Act of Assembly of 9th June, 1926, the Assembly empowered Presbyteries in any case of a vacancy occurring in a parish where, in the opinion of the Presbytery it would be of advantage that the charge should be suppressed or that the parish should be united with another parish, after consultation with a Special Commission appointed by the Assembly, and on due notice being given to the congregation concerned, to suspend all proceedings towards the election and appointment of a minister to the said church and parish until after the General Assembly or the Commission thereof shall have given a deliverance on the matter on a report by the Special Commission. But such suspension is not to affect the rights of the congregation as regards the election of a minister if the parish should ultimately be retained.^{7a} The action thus taken by the General Assembly seems to be well within its competence under the Constitution of the Church and the Act of 1921. But a practical difficulty suggests itself in the way of

^{7a} Enacted, with some modifications, as a permanent Act in 1927, as Act XIV. of General Assembly, 28th May, 1927, Sess. 6. See App., p. 594.

completely carrying through suppression, &c., of a parish without formal recognition of this by the Court of Teinds, arising from the consideration that the parish area is at present the determining factor as regards certain quasi-civil rights, *e.g.*, proclamation of banns, certificates of poverty, &c. (cf. *Hutton and Others* (Wishaw), 1875, 3 R. (H.L.) 9; *Presbytery of Chirnside v. Coldingham Heritors*, 1847, 10 D. 10). (See *infra*, p. 23, and Chap. XI.)

The Court may declare the new parish to remain part of the old parish, so far as regards the poor (*Chirnside, supra*). Otherwise the new parish, ecclesiastically and civilly, stands by itself. In the *Maryhill* case the heritors were held to be bound to keep the church in repair, and to be entitled to an allocation of seats (see *Reid v. Commissioners of Woods*, 1850, 12 D. 1211, at 1215).

A new parish may be erected out of two or more parishes in the same way, and under the same conditions as to liability to or freedom from old parochial burdens, as in the case of its being carved out of one parish.

Erection of new parish out of two or more.

The procedure and conditions as to the *division* of a united parish, under the United Parishes Act, 1868, are referred to *infra*, pp. 25 and 26.

Division of united parish.

Again, a parochial change might be effected by the *disjunction* of lands belonging to one parish, and their *annexation* to another. The transference of those lands from one ecclesiastical area to another operates not only ecclesiastically but civilly. The parishioners and heritors who were liable to the burdens of A parish become liable to the burdens of B parish to which they are annexed. A disjunction and annexation is presumed to be *quoad omnia* unless the words *quoad sacra* are actually inserted in the decree (Lord President Inglis and Lord Kinloch in *Pennel v. Malcolm* (Ballingry), 1869, 7 M. 1078), even though the decree bear that the interest of the minister of A parish for his stipend from the lands annexed to B parish is reserved. After satisfaction of his stipend

Disjunction and annexation of lands.

as so provided, the teinds may be localled on for the stipend of the minister of B. As to the incidence of stipend where lands have been disjoined from one parish and annexed *quoad omnia* to another, see *Simpson v. Ewing* (Bonhill), 1882, 10 R. 313.

Annexation
of lands
quoad sacra
tantum.

When lands have been disjoined and annexed *quoad sacra tantum*, under the Act 1707, this infers an extension of the pastoral area of B parish giving the former parishioners of the portion of A parish which is annexed a right to sittings in the B parish church, and freeing them from liability to *church* assessments for A parish, but not otherwise involving any change civilly in their relations to A parish. Thus, while for ecclesiastical purposes they are parishioners of B parish, for civil purposes they continue parishioners of A parish. They are entitled to seats in the parish church of B, and to all the rights of parishioners, and have been held bound to share the burden of maintaining the *church* of B (contrary to Erskine's dictum, ii. 10, sec. 64), not that of A, (*Drummond v. Heritors of Monzie*, 1773, Mor. 7921). But this decision is somewhat doubtful law (see *Scottish North-Eastern Railway Company v. Gardiner* (Coupar-Angus), 1864, 2 M. 537, at 540, and *Duke of Roxburgh* (Jedburgh), 1875, 3 R. 728; 1877, 4 R. (H.L.) 76). In the last-named case the question of the liability of the heritors of disjoined lands, for building, maintaining, and repairing the church of the original parish, was reserved, but opinions in favour of the continuing liability of the heritors were indicated by several judges, and expressed decidedly by Lord Deas. (See also the judgment in *Magistrates of Fortrose, &c. v. Maclellan* (Rosemarkie), 1880, 8 R. 124, which is distinctly opposed to the spirit of the decision in *Drummond's* case.)⁸ The heritors of the disjoined lands are not liable for assessments for main-

⁸ The judgments in the Sheriff Courts appear to indicate a growing opinion that the case of *Drummond* was a special one, and was not meant to supersede the general law laid down by Erskine. (See *Aitken v. Waddell*, 1889, 5 Sh.Ct.Rep. 262, and *Aitken v. Thomson*, 1889, *ibid.*, p. 300.)

taining the *manse* of B (*Park v. Maxwell* (Carmun-
nock), 1748, Mor. 8503), and, if so, unless they are liable
for the manse of A, they would apparently escape any
ecclesiastical burdens (*Magistrates of Fortrose, supra*).
The minister of A continues to draw his stipend from
the annexed lands (*M'Donald v. Campbell* (Fortingall),
1836, 9 Jur. 8); and in the very few parishes
where heritors continue to provide for the poor, the
liability of the heritors of A parish is unaltered.

The New Parishes Act of 1844 (7 & 8 Vict. c. 44, secs. 8, 11) provides, with reference to the disjunction and erection of *districts* into parishes *quoad sacra*, that where a church, and endowment therefor, is provided by any person or persons, the Court may, on his or her or their application, where the number of such persons does not exceed five, or of two-thirds, or any ten of such persons where they exceed five in number, and without any concurrence of heritors, inquire into the circumstances, and erect such church into a parish church, and designate a district to be attached thereto *quoad sacra*, and disjoin such district *quoad sacra* from any parish or parishes to which it may have belonged, and erect it into a parish *quoad sacra*, the minister and elders having the status of a parish minister and elders. The provisions as to minister's stipend, manse, &c., are stated and explained *infra*, pp. 298, 299. The titles of such a church are to be taken and conceived so as that it shall be inalienably secured as the church of the new parish in connection with the Church of Scotland. It was held in the *Dalreoch* case that a 999 years' lease of a church site did not satisfy this condition (*Donaldson, &c.*, 1873, 11 M. 489). Lord Jerviswoode observed, "My view is that a lease, however long, cannot be looked on here as a sufficient title." (The Lord Justice-Clerk and Lord Ardmillan dissented.) Due provision must be made for the future maintenance of the fabric of the Church.⁹

Disjunction
and erection
of districts
into parishes
quoad sacra,
under 7 & 8
Vict. c. 44,
secs. 8, 11.

⁹ "The Erection of Parishes *Quoad Sacra*, &c.," by Nenion Elliot, S.S.C., 1879, gives an account of the procedure of the Court of Teinds under the Act 7 & 8 Vict. c. 44.

Considerations governing erections.

The Court of Teinds did not sanction the erection of a *quoad sacra* parish merely because a manse and stipend had been provided for the minister, but only did so when satisfied that it was necessary for the spiritual interests of the district, on account of the distance of the parish church, or the growth of population, or some such circumstance: In *Irvine v. Maxwell* (Dornock, &c.), 1873, 11 M. 409, Lord President Inglis observed, "It is too much taken for granted that, if the parties have provided a church, and have made arrangements for the payment of the minister, it follows as a matter of course that the Court will assign a district. If any such idea prevail, the sooner it is put an end to the better, for that is not the object of the Act of Parliament."

It has been decided that the Annuity Tax Abolition Acts, 1860 and 1870, did not in any way affect the jurisdiction of the Teind Court under the Act 7 & 8 Vict. c. 44, sec. 8, and that an application for the erection of a parish *quoad sacra* must be judged of on the same principles as any other similar application under that section, and—in the under-cited case—that the Lord Provost, Magistrates, and Town Council of Edinburgh were proper objectors in such an application, and that the competency of the application and the expediency of granting it being both doubtful, the application should be refused (*Murray, &c. v. Magistrates of Edinburgh*, 1874, 1 R. 482).

How affected by recent legislation?

As has been already observed, the powers of the Court under the Act of 1844 (7 & 8 Vict. c. 44) must for the future be regarded in the light of the provisions contained in the Acts of 1921 and 1925, by which, in practice, their scope will be found to be considerably modified; and the same is true of the decisions of the Court in so far as they are interpretive of the nature of its powers under the Act of 1844. But in that Act there is much

which still stands formally unsuperseded as law, and which will under any state of things remain useful as a guide to sound practice to whatever authority may in the result have to deal with the erection of new parishes. So, too, the decisions have a permanent value in many instances as expositions of principles which will endure even after the expiry of the transition period which must elapse before the new legislation takes full effect; and in not a few instances they decide questions of civil right which are independent of the particular method by which the parish came into being. For these reasons it has been thought useful to retain to a considerable extent the statement of the statutory provisions and leading decisions bearing on the erection of parishes *quoad sacra*, and on erection and other alterations of status of other parishes under various other statutory provisions.

The expression, "the ministers of the Established Churches in Kilmarnock," in a deed constituting a private trust was held to mean "not only the ministers of the Laigh Kirk, but also the ministers of the *quoad sacra* churches which have been created from time to time" (*Buchanan Bequest Trustees*, 1886, 14 R. 284), thus recognising the truly parochial position of *quoad sacra* parishes. Six months later it was held that the minister of a chapel of ease that had been built by private subscription, on his being "inducted" to the same charge after its erection into a *quoad sacra* church, was entitled and bound to become a contributor to the Ministers' Widows' Fund (*Maclagan v. Brown* (St. Margaret's, Dumbiedykes), 1887, 14 R. 1083; for observations on this case, per Lord President Inglis, see *Hastie v. M'Murtrie*, 1889, 16 R., at 731).

The heritors of a *quoad sacra* parish continue liable for the maintenance of the church of the old parish (L. J.-C. Hope in *Reid v. Commissioners of Woods* (Maryhill), 12 D. 1215).

"Minister of Established Churches in" a district includes ministers of *quoad sacra* parishes.

Liability of heritors of respective parishes for maintenance of (a) old church: (b) church of newly-erected parish *quoad sacra*.

For the *maintenance* of the church of the newly erected *quoad sacra* parish, and other expenses, it is provided (7 & 8 Vict. c. 44, sec. 9), that, after providing free seats, not exceeding one-tenth of the whole sittings, a minister's pew, and a pew for officiating elders, a portion of the sittings in the church, not exceeding one-fifth of the whole sittings, shall be let at rents not exceeding a rate to be fixed by the Presbytery of the bounds, and the remaining portion of the sittings may be let in such manner as is agreed upon by the minister for the time being, and the person or persons liable for the repair of the church and for the stipend of the minister; and in the event of their not agreeing, the Sheriff of the county determines the matter. As to the application of the pew rents the same Act provides—

Pew rents in *quoad sacra* churches.

“The PEW OR SEAT RENTS of any such church as aforesaid may be expended and applied for the purpose of defraying the necessary expenses of a precentor, a beadle or kirk-officer, and other expenses necessarily incurred in dispensing the ordinances of religion therein, and not otherwise provided for, and for the purpose of upholding in due repair and improving the fabric of such church, or of the dwelling-house and offices of the minister, or for the relief of any person or persons who may have undertaken or become liable to uphold the same, or who may be liable for the endowment or stipend provided and secured for the minister of such church; and it shall be lawful to make collections at the door of any such church for any of the purposes aforesaid: Provided also, that the sum received by any person liable to uphold the church or dwelling-house, or liable for the endowment or stipend as aforesaid, shall not in any year exceed the sum paid or expended by such person in the same year by reason of such liability” (sec. 9).

What covered by “Expenses of a precentor.”

It is thought that, where precentors have ceased to be appointed owing to the introduction of organs, the salary of the organist or leader of psalmody (or

both) may be paid from the fund provided by seat rents.

The importance of being able to make operative the provision as to the payment of seat rents should not be overlooked by those desiring the erection of a parish *quoad sacra*. Lord President Inglis in refusing such an application remarked, "If the erection is to be effectual, the people in the district will have to resort to the church. People are entitled to go into their parish church without any payment, whereas, if they go to the new church, they will have to pay seat rents" (*Irvine v. Maxwell* (Dornock, &c.), 1873, 11 M. 409). A minister is not entitled to dispense at his own discretion with seat rents; they are virtually part of the endowment.

By sec. 29 of the Church of Scotland (Property and Endowments) Act, 1925 (15 Geo. V. c. 33), it is enacted that, "on the expiry of one year from the date on which any church is, in pursuance of this Act, transferred to the General Trustees, the right of allocating sitting accommodation in the church, whether with or without payment therefor, and the right of disposal of any proceeds therefrom, shall belong to the kirk-session, or to such other body as the General Assembly may direct, and any existing right to such accommodation shall cease and determine."

Provisions as to seat rents in sec. 29 of the Property Endowments Act do not apply to *quoad sacra* parish churches.

Although this provision appears *prima facie* to be perfectly general in its terms as regards "any church . . . in pursuance of this Act transferred to the General Trustees," sec. 29 occurs in Part III. of the 1925 Act, which is concerned with churches, &c., of parishes *quoad omnia*, with certain specified exceptions. And sec. 27 expressly provides that "the following provisions of this part of the Act shall have effect and shall apply to such parishes only." By sec. 34 (1) in the case of *quoad sacra* parishes erected before the passing of the Act (a) the statutory proper-

ties and endowments of the parish (which include the church—sec. 34 (4) (i))—are to be transferred to these trustees. Not only do the provisions of sec. 9 of the Act of 1844 above quoted apply to all such churches, but in the case of many churches the substance of these is set out in obligatory terms in their trust deeds,¹⁰ and the proceeds of the seat rents are expressly confided to the management of the Church Trustees for the purposes defined in the deeds (usually corresponding to those in sec. 9 of the Act of 1844). No reference is made to the matter of seat rents in sec. 34, which purports to deal with parishes *quoad sacra* erected under the Act of 1844; but the properties passing under the statutory transfer of that section to the General Trustees are to be held by these trustees (sec. 34 (1) (g)) “for the same ends, uses, and purposes as those for which they were held by the trustees or other persons in whom they were vested prior to their being so transferred.” The rights given to the kirk-session in regard to the proceeds from payments for sitting accommodation under sec. 29 might have been quite inconsistent with the continuance of existing trusts as here provided for; and it was therefore appropriate that the seat rents of churches of parishes *quoad sacra* should continue to be regulated by the provisions of sec. 9 of the Act of 1844, and/or of their own constitutions, as these may be altered from time to time by the General Assembly.

Procedure as
to intimation,
&c.

Intimation of an application for the disjunction and erection *quoad sacra* of a church and district situated wholly within a *quoad sacra* parish should be made both in the original and the *quoad sacra* parish churches (*Whitelaw, &c.* (Airdrie), 1875, 3 R. 88). In the case of *Nicholson, Petitioner* (Arisaig and Moidart) (1919, 1 S.L.T. 292; 56 S.L.R. 438), the judges of the Court of Teinds con-

¹⁰ A synopsis of the provisions of the various Model Trust Deeds of *quoad sacra* parishes in regard to this matter will be found in the Appendix to the Report of the Church of Scotland on Freewill Offerings, dated 23rd May, 1924, in the Assembly Reports for 1924, pp. 831, &c.

curred in the view expressed by Lord Sands that, in a petition for disjunction and erection of a parish *quoad sacra*, it is unnecessary to narrate the statutes empowering the Court to act in the matter. The proclamation of *banns* is one of the functions and duties of the office of minister of a church erected into a parish church under the Act of 1844, for the district attached thereto as a parish *quoad sacra* (*Hutton, &c. v. Harper, &c.* (Wishaw), 1876, 3 R. (H.L.) 9).

Banns fall to be proclaimed in *quoad sacra* church.

Provision is made under the New Parishes Act, 1844 (7 & 8 Vict. c. 44), for erecting *Gaelic Churches* and congregations into parishes with *or without* territory (secs. 12 and 13). The constitution of the latter class is somewhat of an anomaly, as normally territory is regarded as essential to the idea of a parish; but the conception is not opposed to the canon law.¹¹ The ministers and elders of such a parish enjoy all the powers, rights, and privileges of ministers and elders of the Church of Scotland, "Provided always that nothing herein contained shall be construed as giving to the minister or ministers and elders of any such Gaelic congregation right to exercise pastoral superintendence and discipline over persons who are not either members of such Gaelic congregation, or of the families of such members, or resident within the territorial district, if any, which may be assigned to such parish exclusively" (sec. 13). It is not necessary that both services on Sunday should be in Gaelic (*Christian Knowledge Society v. Magistrates of Edinburgh*, 1850, 12 D. 1216). It is needless to say that the

¹¹ "Parishes, as a rule, are distinguished from each other, and the number of people belonging to each parish is usually determined by territorial circumspection or boundaries. We say as a rule; for it is not repugnant to canon law that a parish, in the canonical sense of the word, should consist of certain families, even though living in the districts of other parishes. In the United States, German (Roman Catholic) congregations are usually established in this manner—that is, they are made up of the German Catholics of a place, no matter whether they live in the confines of English-speaking congregations" (Smith's "Elements of Ecclesiastical Law, adapted especially to the Discipline of the (R.C.) Church in the United States," 1887, vol. i., p. 405).

heritors of such a district and the congregation remain in all civil respects parishioners of the mother parish.¹²

Special provisions for Highlands and Islands.

By 4 Geo. IV. c. 79, the commissioners appointed by that Act were authorised to erect or purchase places of public worship in the *Highlands and Islands* of Scotland. The cost of such buildings and the stipend of the minister, who had the status of assistant minister of the parish within which the new place of worship was provided, were to be paid from the public funds provided by the Act. Provision for a certain district being defined and set apart for such an assistant minister was made by sec. 6 of 5 Geo. IV. c. 90. The Act 7 & 8 Vict. c. 44, sec. 14, provided that, upon application by the Presbytery within which any such place of worship was situated, or by one or more heritors holding together one-fourth part of the valuation of the district, or by the Lord Advocate, the Court might disjoin the district from the parish or parishes to which it, or any part of it, belonged, and erect the district into a parish *quoad sacra*, and the minister and elders of such a parish were declared to have the status of a parish minister and elders of the Church of Scotland. The provisions of this section were extensively taken advantage of—all the places of worship constituted under the Act 5 Geo. IV. c. 90 having been erected into parishes *quoad sacra* under them.

By sec. 15 of the same Act it was provided further that, if application were made to erect such a district alone, or with additions thereto, into a parish *quoad omnia* with the requisite consent of heritors, the Court might give effect to such application; the commissioners, under 4 Geo. IV. c. 79, and 5 Geo. IV. c. 90, would thereupon cease to hold the place of worship

¹² The Act of Assembly of 23rd May, 1843, declared previous Acts of Assembly relative to ministers of chapels of ease, &c., to be rescinded. Without a proper constitution, a church erected under such rescinded Acts was thus not even a chapel of ease; it was a meeting-house wholly under jurisdiction of the minister and kirk-session of the parish and ecclesiastical authority of the Presbytery of the bounds.

and the minister's dwelling-house (now become respectively the parish church and manse of the new parish), and the burden of upholding these would fall on the heritors of the parish. This section was not taken advantage of in practice. The minister of a parliamentary church, under 5 Geo. IV. c. 90, has no control over repairs on the church buildings carried out by the heritors at their own expense. He has right to apply the pew rents to keeping the buildings in repair, but none whatever to interfere with repairs undertaken by the heritors. Where a minister sought interdict against such repairs being executed the Court refused it. Lord Young observed, "This seems to me a most nimious application" (*Macdougall v. Duke of Portland* (Berriedale), 1892, 20 R. 105).

Under the Property and Endowments Act of 1925 (15 Geo. V. c. 33), provision is made (secs. 21 (1) (c) and (d) and 24) for the transfer to the General Trustees of the sites and fabrics of the churches and manses and of the endowments of certain parishes *quoad omnia* enumerated in Schedule VIII. to the Act—being Gaelic Churches erected under the Act of 1844 (7 & 8 Vict. c. 44)—by order made under a scheme framed after inquiry by the Scottish Ecclesiastical Commissioners created under sec. 20 (see *post*, p. 41). And by secs. 21 (1) (b) and 23 provision is similarly made for transfer to the General Trustees of the fabrics and sites of the "parliamentary churches" enumerated in Schedule X., which have been erected under the Act 5 Geo. IV. c. 90, or otherwise, and of all powers and duties with respect to the maintenance and repair of the said fabrics and the allocation of sitting accommodation in the said churches (see *post*, p. 42).

In 1866 an Act was passed to provide for the case of *united parishes* in which two or more parish churches already existed, and where, from increase of population or other change of circumstance, it might be expedient to apply, under the provisions of the 1844

Transfer under Act of 1925 of
(a) Gaelic Churches;

(b) Parliamentary churches.

Erection of *quoad sacra* parish out of district of united parish having more than one existing church.

Act, for the erection of a parish *quoad sacra*, and to give the heritors of the united parishes power to convey one of the parish churches to the party or parties endowing the parish *quoad sacra* (29 & 30 Vict. c. 77). This Act, as not sufficiently accomplishing the objects for which it was designed, was repealed by the Act 31 & 32 Vict. c. 30, the United Parishes (Scotland) Act, 1868. This latter Act provided that whenever, in the case of a united parish containing two or more parish churches, any persons had undertaken to endow one of the churches along with a district, being part of such united parish to be attached thereto, it should be competent for them to apply for the *disjunction* of such district, and for the erection of it into a parish *quoad sacra*, in terms of the 8th section of the 1844 Act, and for the Court to entertain and dispose of the application in the same manner and to the same effect as if the persons applying for such disjunction and erection had at his, her, or their expense built or acquired, or undertaken to build or acquire, a church, in order to its being erected into a parish church in connection with the Church of Scotland. It was provided that it should not be necessary for the persons applying for such disjunction and erection to make any provision for the maintenance of the fabric of the church which they had undertaken to endow (sec. 2).

It was competent for the Court, in pronouncing decree of disjunction and erection in an application presented under the above section, to declare that the church undertaken to be endowed should from and after the date of the decree, be the parish church of the newly erected parish; and this declaration invested the minister and kirk-session of the newly erected parish *quoad sacra* with all those rights in relation to the church which were formerly vested in the minister and kirk-session of the united parish (sec. 3). But the church so declared to be the church of the new parish *quoad sacra* is not subject to the provisions of any trust constituted in terms of the 1844

Act, nor to any trust applicable to a church erected by voluntary contributions, as the church of a parish *quoad sacra*, (sec. 4). Nothing in the Act was to increase or affect the existing liabilities of the heritors in any parish, and the Act was to be deemed to be incorporated in the 1844 Act, (secs. 5 and 6).

The trustees, kirk-session, and managers of a *quoad sacra* parish having presented a petition for the annexation *quoad sacra* to it of a district forming part of the Barony parish, Glasgow, the Court held that the consent of the heritors of the Barony parish was not necessary as the matter did not affect their interests, and, in the circumstances of the case, granted the petition (*Baird* (Kelvinhaugh), 1893, 20 R. 973). These matters would seem now to fall within the competence of the General Assembly, without the necessity of resort to the Court of Teinds. (See Church of Scotland Act, 1921, and *supra*, pp. 13 and 14.)

The constitution of *quoad sacra* churches has passed through many forms, and cannot be said to be entirely satisfactory, if the intention of the framers was to reproduce as nearly as possible the organisation of old parishes. The church property is held by trustees, partly *ex officiis* and partly elected; the managers are the responsible body generally in the church affairs, and the kirk-session is apt to be regarded as a secondary authority. Questions from time to time arise between those bodies as to their respective rights.¹³ In the case of the *Committee of Management of Forth Church v. Darling*, 1898, 1 F. 177, a feu-duty was held by the trustees for, *inter alia*, payment of the expense of maintaining the fabric of the church and manse, and payment of the surplus, if any, towards defraying costs of management and supplementing the

Constitutions
of *quoad sacra*
parishes.

¹³ For a very full account of the difficulties experienced in regard to such Deeds of Constitution reference may be made to the exhaustive Report presented to the General Assembly of 1899 by a Committee appointed to investigate the subject, and to the Report already referred to presented to the General Assembly of 1924 by the Committee on Freewill Offerings (Assembly Reports, 1924, p. 831).

minister's stipend, or otherwise in improving the condition of the church and parish as the trustees should determine. It was held that, although the committee of management of the church had the duty of entering into contracts for necessary church repairs, and were entitled to payments from the trustees under certain circumstances for such purposes, they were not entitled to require the trustees to hand over the funds to them, as it was the duty of the trustees to administer the fund in their hands. (Cf. *infra*, p. 30.)

Requisite
notice of
meetings of
management
committees.

In an earlier stage of the same case one of the committee of management pleaded that the action was not duly authorised, as he had not been present at, nor called to, the meeting at which the action was authorised. He did not say he was ignorant that such a meeting had been called, and the Court held that with his knowledge it was his duty to attend, and the intimation must be held to have been sufficient (*Darling v. Darling* (Forth), 1898, 25 R. 747). Notice had been given from the pulpit. The constitution contained no provision as to how meetings should be called. The opinion was indicated that, if the managers had had reason to believe that the objecting manager did not know of the meeting, they would have acted wisely in adjourning the meeting, seeing that the purpose of the meeting was to authorise an action to be raised against him. It may be observed that there is sometimes slackness in church affairs both in giving notices of meeting and in recording proper minutes, and it is desirable that notices should be duly posted to each manager, giving him notice of each meeting, with a brief indication of the business to be dealt with. In the cognate matter of the administration of an ordinary trust it was observed in the case of *Reid v. Maxwell*, 1852, 14 D. 449, that it is essential that the outmost fairness and openness should be observed by trustees towards each other, that ample time and opportunity for de-

liberation should be afforded, and that if any concealment or underhand dealing, or any misleading or deception in order to carry a measure by surprise should appear, the Court, as a Court of equity, would be entitled and bound to control and restrain trustees in such abuse of their powers." This case was approved in *Wyse v. Abbott*, 1881, 8 R. 983, and again in *Darling's case*, *supra*. Church managers should be no less careful than other trustees (see *Cathcart case*, *infra*).

In the case of *Cambuslang West Church Committee v. Bryce*, 1897, 25 R. 322, where an action had been raised by a committee of management of a chapel of ease, three of the number lodged a minute disclaiming the action, and the Court, holding that they had never given their authority to it, found them entitled to have their names deleted from the record, and gave decree for expenses against the remaining pursuers. Here again, it appears, no notice of meeting had been given save from the pulpit. Lord Trayner observed, "There may be cases where certain persons may be required to lend their names in an action which they would not themselves be prepared to institute, provided they are secured against all personal liability on account of such proceedings. But I do not know of any case where legal proceedings can be taken by one person in the name of another who has never been consulted on the subject or informed that his name was to be used" (p. 329).¹⁴

In the *Cathcart case* (*Gordon v. Real Rent Heritors*

¹⁴ The same case decided another point of importance. An effort having been made to raise funds to provide for the erection and endowment of a chapel of ease as a parish *quoad sacra*, the minister's father-in-law, in the course of a private letter which began, "My dear John," wrote the minister, "I will give you £100 towards endowment should your subscriptions fall short, so that this renders further discussion of the £100 in question unnecessary." An action by the managers to enforce payment was raised; the Court assailed the defender, the majority of the judges holding the pursuers had no title to sue, as the promise, if obligatory, was one given to the minister, not to the managers. Lord Young based his decision on the different ground that there was no document of debt on which to sue.

of *Cathcart*, 1925 S.L.T. 125), the Lord Ordinary (Blackburn) observed that, where "meetings had been advertised in the manner prescribed by statute, the failure of the present defenders to attend and table their objections at these meetings cannot be excused by any Court, either on the ground that they failed to notice the advertisements and the intimations, or on the ground that they had failed to realise the obligations which they had undertaken in becoming heritors." A similar principle would probably be applied to notices given in the form prescribed in a deed of constitution.

In the case of the *Blythswood Parish Church Trustees*, 1920 S.C. 654, a petition to the Court of Teinds craving the Court to unite two *quoad sacra* parishes as one *quoad sacra* parish was granted.

Effect of
erection
quoad sacra
on rights
under parish
trusts, &c.

In a petition for approval of a scheme for the administration of a trust fund held by a kirk-session for the education, within their parish, of the children of parishioners and others, it was held that the inhabitants of a *quoad sacra* parish disjoined from the petitioners' parish after the constitution of the trust had not ceased to be beneficiaries of the trust (*St. Nicholas' Kirk-Session* (Aberdeen), 1915 S.C. 834; see also *Buchanan Bequest Trustees* (Kilmarnock, &c.), 14 R. 284).

Pathhead Parish Trustees, 1920 S.C. 109, were, in the circumstances of their case, allowed to sell lands held by them as trustees for the endowment of a *quoad sacra* church and to invest the proceeds in $2\frac{1}{2}$ per cent. Government annuities.

Reference has already been made to the difficulties arising under deeds of constitution between the trustees and the managers of the church. In *Forth Church Managers v. Darling*, 1898, 1 F. 177, a feu-duty was conveyed to the trustees of a *quoad sacra* church for maintaining the fabric of the church and manse and for similar church purposes. The management of the secular affairs of the church was in the

hands of a committee of management. It was held that the committee might be entitled to payments by the trustees for expenditure actually incurred, but that they were not entitled to oust the trustees from the administration of the trust by calling upon them to hand over *ab ante* the feu-duties as they were received.

In the case of *Cheyne, Petitioner* (Oban), 1904, 41 S.L.R. 431; 11 S.L.T. 776, a petition was presented to the Court of Teinds for amendment of the deed of constitution of a *quoad sacra* parish which had been disjoined thirty-six years previously, the object of the amendment being to substitute elected trustees for the existing body of trustees, who held office for life. The Court allowed a supplementary deed of constitution adjusted by the Lord Ordinary on Teinds to be received by the clerk into the original process as supplementary to the subsisting deed of constitution, on this being granted by the General Assembly or the delegation thereof, due care being taken to conserve all interests vested under the original deed.

THE PROPERTY AND ENDOWMENTS ACT, 1925 (15 Geo. V. c. 33), contains provisions which will obviate such difficulties for the future. These are applicable to parishes *quoad sacra* erected under the Act of 1844 other than parishes erected under sec. 14 thereof which are separately dealt with under secs. 21 (1) (b) and 23 of the 1925 Act.

By sec. 34 it is enacted that, in the case of a parish erected *before* the passing of the Act (28th May, 1925)—

“ The General Assembly, or any body to which the General Assembly may delegate the necessary power, may at any time after the completion of the transfer to the General Trustees of the properties and securities specified in any such inventory alter the existing deed of constitution of the parish to which the inventory relates, or annul the

Amendment
of constitu-
tions.

Alteration of
constitutions
of *quoad sacra*
parishes
under 1925
Act.

15 Geo. V.
c. 33, sec. 34
(1) (f).

said deed and grant a new deed of constitution in place thereof,"

and that in the case of such a parish erected *after* the passing of the Act (28th May, 1925)—

Ibid., sec. 34
(2) (b).

"The original deed of constitution shall be in such terms of the General Assembly, or any body to which the General Assembly may delegate the necessary power, may direct, and the General Assembly or any such body may subsequently alter the said deed or annul the same and grant a new deed of constitution in place thereof."

Evidence of
parish
boundaries.

The proper evidence of the *boundaries* of a parish is the statute, Order in Council, or decree of parliamentary commissioners or (subsequent to 1707) of the Teind Court erecting it. Owing to the destruction, in 1700, of the records of the Teind Court, it is not always possible to produce such evidence. Among adminicles of evidence which will be received by the Court are statements, admissions, or decrees in actions for augmentation of stipend, modification, and locality; for valuation of teinds, for the designation of manse, glebes, or churchyards; for building or repairing churches and schools—tending to imply that the district in question was united, erected, or annexed, or to rebut that inference; the description of the lands parochially in the cess-books of the county; in old charters or Acts of Parliament (cf. *Locality of Kirknewton v. Liston*, 1831, Shaw, Teinds, 271); the entry of them in connection with the name of their owners in the register of births, marriages, and deaths for a particular parish (*Todd v. Sandison* (Eyemouth), 1868, 5 S.L.R. 496; *Minister of Rescobie v. Carnegie*, 1869, 7 M. 514). Significance also attaches to the circumstance whether there is, or has been, more than one incumbent—(see Act 1581, c. 2, [12], against pluralities of benefices)—or schoolmaster in the district; or more than one patron exercising

rights of presentation. If so, there was probably originally some territorial parochial reason.

The Ordnance Survey, and the Lands Valuation Roll, also Reports of Commissions on Parliamentary Boundaries, and reported cases of the Court of Teinds are also likely sources of information. Verbal testimony is not irrelevant, but the value to be put on it is always uncertain; plans, rentals, tacks, &c., are admissible (see L. P. Boyle, *College of Glasgow v. Earl of Eglinton's Trustees*, 1845, 7 D. at 970). Evidence of the configuration of the ground as suggesting one or two parishes has been admitted as of importance (*Campbell v. Campbell*, 1852, 15 D. 5 at 10). In the *Rescobie* case, 1869, lands which had, since 1704, been described in the titles as in one parish, and had for many years paid stipend to the minister of it, were found to lie truly in the adjoining parish, and were liable in teind in it. As to the nature of the proof, see *Minister of Rescobie v. Carnegie*, 1869, 7 M. 514.

In a case decided in the following year, a stream which formed the boundary between the parishes of Buittle and Kelton, both in Kirkcudbright, was shown to have had its course diverted in 1800. Several years later the piece of ground situated between the old and new channel came to be regarded as forming part of the parish to which it did not originally belong, and to be assessed for poor rates and other taxes accordingly. It was held, in a question of settlement between the parishes, that the piece of ground still belonged to the original parish (*Knox v. Hewat*, 1870, 8 M. 397). The regard paid by the Court to evidence as to the recognised boundary of a parish in times long past shows the importance in any question of this kind of careful study on the part of all concerned in the inquiry, not only of easily accessible books and papers, but of whatever records, historical and topographical, are extant of the district in which the parish is situated.

For an informative exposition of the nature and criticism of the value attaching to the various kinds of evidence relevant to prove parish boundaries, reference is made to the case of *Meacher v. Blair-Oliphant*, 1913 S.C. 417, and especially to the judgment of Lord Kinnear, at pp. 436, 437.

II. LAW AS MODIFIED BY STATUTES OF 1921 AND 1925.

The bearing of the Church of Scotland Act, 1921 (11 & 12 Geo. V. c. 29), and the Church of Scotland (Property and Endowments) Act, 1925 (15 Geo. V. c. 33), upon the law which forms the subject-matter of this chapter depends not so much upon any express provisions contained in them dealing in terms with the parish as an ecclesiastical unit, as upon the general scope and intent of the two Acts,—the emphatic recognition given in the Act of 1921 to the paramount right of the Church to control over certain matters to a degree not hitherto accepted as unquestionable,—and the radical modification (and, in some instances, the complete abolition) by the Act of 1925 of those patrimonial rights and duties in, and liabilities connected with, churches and manses, glebes and kirkyards, and the service of the cure—the rules regulating which form the main portion of the common law of the parish.

This is especially true of that part of the law which relates to

(a) OLD PARISHES, *i.e.*, PARISHES *Quoad Omnia*.

Bearing of
these Acts on
the erection,
&c., of
parishes.

There is not in any section of either Act any provision which expressly abrogates the previously existing law applicable to such parishes. It is nowhere declared, for example, that it shall no longer be lawful for the Court of Teinds to exercise the functions which it has hitherto discharged with regard to such matters as the erection, disjunction, annexation, union, or

disjunction of parishes. On the contrary, the continuance of its jurisdiction in such matters seems to be at least possibly inferentially recognised. And cases may occur in which it may be convenient that the aid of the Court should be invoked administratively in regard to them. But Article iv. of the Schedule to the Act of 1921—which, having been adopted by the General Assembly, with consent of a majority of Presbyteries, as the constitution of the Church, has through an Order in Council received statutory recognition as to its lawful constitution (Act of 1921, sec. 4, and Order in Council of 28th June, 1926) —affirms the right and power in the Church, subject to no civil authority “to legislate and adjudicate finally” in all matters of doctrine, worship, government, and discipline in the Church, including, *inter alia*, “the right to determine all questions concerning membership and office in the Church, the constitution and membership of its Courts, and the mode of election of its office-bearers, and to define the boundaries of the spheres of labour of its ministers and office-bearers.” These powers may, manifestly, be exercised in such a way as to be quite incompatible with the measure of control hitherto in use to be had by the Court of Teinds over the matters referred to. Moreover, the Act of 1925 contemplates, and provides (sec. 26) for complete transference to the General Trustees for the Church of (broadly speaking) all rights of property in and duties of maintenance and extension with respect to the churches, manses, and glebes of parishes *quoad omnia*, and the transfer to and vesting in (in most cases) the Parish Council of all such rights and duties with respect to the churchyards of such parishes, “and the extinction of all such rights and duties as aforesaid hitherto belonging to or incumbent upon heritors or ministers.” Sec. 27 forbids generally the institution, after 1st February, 1925, of proceedings under sec. 3 of the Ecclesiastical

App., pp. 533
and 593.

Effect of 1925
Act on former
incidents of a
quoad omnia
parish.

31 & 32 Vict.
c. 96.

App., 568.

Buildings Act, 1868, for building or repairing, &c., of churches or manses, or the designation or excambion of glebes or additions to glebes, or the designation or excambion of sites for or additions to churchyards and the suitable maintenance thereof, except as otherwise provided for by provisions in the Act which are of merely temporary and transitional operation. And, lastly, the common law liability for payment to the minister of the parish of stipend out of teinds is, in the due course of working out of the scheme of the Act, to be superseded by a mere liability to make to the General Trustees of the Church payment of a fixed "standardised" sum of money in each year, which, so far as not redeemed, will form a real burden on the lands, analogous to feu-duty. It is true that, by sec. 36, it is enacted that all moneys received by the General Trustees with respect to any parish under or in pursuance of the provisions of this Act relating to stipend, and any church, manse, glebe, or other property, heritable or moveable, situated in, or forming part of, the endowments of any parish transferred to, or received by, the General Trustees by or in pursuance of this Act, and the proceeds of any such moneys, property, or endowments shall be appropriated in the first place to meeting the proper requirements of that parish or its neighbourhood (as such requirements may be determined by the General Assembly, or by any body to which the General Assembly may delegate the necessary power); and that it is only any remainder after these requirements have been fully met which is to form part of a general fund at the disposal of the General Assembly. But it will be observed that, even under the section, the judgment as to what are the needs of any parish rests ultimately with the General Assembly.

It is obvious that these statutory innovations are such that, when they have borne their full fruit,

there will be very little, if anything, left to be regulated by the common law and earlier statutes which hitherto applied to parishes. They render practically impossible for the future the creation of anything which can have any substantial resemblance to the old parish *quoad omnia*. The new order of things is inconsistent with the old, and will in due course supersede the latter as effectually as if it had been expressly so enacted; and it is to be observed that by sec. 1 of the Act of 1921 all statutes and laws, in so far as they are inconsistent with the Articles, are expressly repealed and declared to be of no effect. To the like effect sec. 48 of the 1925 Act repeals so much of any Act as inconsistent with that Act.

Repeal of statutes, &c., inconsistent with Articles and with Act of 1925.

But it should be noticed (1) that, in regard to many matters, there will necessarily be an interregnum during the continuance of which the older law will remain operative; and (2) that the new rights and duties introduced by the Acts are in many instances defined and can only be ascertained by references to the measure of the existing rights and duties in place of which they come or are to come,—*e.g.*, the liability for stipend on which the future standardised charge will be based, the measure of the obligation of putting churches and manses into a reasonable state of tenantable repair, and the right to a single and final augmentation of stipend. So that for these purposes it will be necessary to resort to the older law as it stood prior to the coming into operation of these Acts.

It has been pointed out that it may still formally be competent to apply to the Court of Teinds for disjunction and erection, for union or annexation or disjunction of parishes, as seems to be inferentially recognised in sec. 34 (2) in the case of erection of a new parish *quoad sacra*. And in certain cases it may be convenient, even with respect to old parishes, to do so, as, *e.g.*, in that of a collegiate charge or of two adjoin-

Expediency of formal resort to Court of Teinds in certain cases.

ing parishes with small stipends, where union of the charges or parishes might provide one suitably endowed charge well within the capacity of a single incumbent to fill. (Compare the cases of *Kirkwall Parish* and *Blythswood Parish, Glasgow*, whereof *supra*, and also the case of *Culross*, 1925 (unreported), where two collegiate charges were combined after the passing of the Act of 1925.) There seems to be no objection to such an application—at least if made before the occurrence of a vacancy actually or by election or notification. But consideration of the language of Article iv. of the Schedule to the Act of 1921 (11 & 12 Geo. V. c. 29) suggests that it could hope to succeed only if presented by or with the authority of the Church. For it would seem to be quite inconsistent with that article for the Court of Teinds to act in such matters for the future otherwise than merely administratively.

The particular provisions of the Act of 1925 (15 Geo. V. c. 33) with regard to the various matters, such as stipend, churches, manses, glebes, and churchyards will be found in the chapters dealing with these various matters.

In the case of

(b) PARISHES *Quoad Sacra*

Provisions of Act of 1925 affecting erection, &c., of parishes *quoad sacra*.

the statutory provisions are more direct and precise—the Act of 1925 (15 Geo. V. c. 33) providing what is in effect a code applicable to these parishes. This applies (sec. 34) to all parishes *quoad sacra* erected under the New Parishes (Scotland) Act, 1844; the United Parishes (Scotland) Act, 1868; and the United Parishes (Scotland) Act, 1876—(other than parishes *quoad sacra* erected under sec. 14 of the said Act of 1844, which are separately dealt with, see *supra*, p. 25, and *infra*).

Parishes erected prior to 28th May, 1925.

The provisions with respect to the case of a parish erected *before* the passing of the 1925 Act are contained in sec. 34 (1), and are (in addition to that for

alteration of the existing deed of constitution by the General Assembly already quoted, *supra*, p. 31), as follows:—

- (a) The statutory properties and endowments of the parish shall be transferred to the General Trustees as in this section provided; “Statutory” properties and endowments to be transferred to General Trustees.
- (b) As soon as conveniently may be after the passing of this Act there shall be prepared by the General Trustees and certified by the Clerk of Teinds with respect to each parish, an inventory referring to this section of this Act and setting out the statutory properties and endowments of the parish, and each such inventory shall specify— Inventory to be prepared.
- (i) the name of the parish;
 - (ii) each property or security forming part of the said statutory properties and endowments; and
 - (iii) the name or names of the person or persons in whom the same is vested;
- (c) Without prejudice to the provisions of the immediately following paragraph of this sub-section, any person in whom any property or security specified in any such inventory is vested shall, if so required by the General Trustees, and at their expense, transfer such property or security to the General Trustees, and do and concur in doing all acts and things necessary for that purpose; Methods of transfer.
- (d) Upon any such inventory in so far as the same relates to heritable properties or securities being recorded in the appropriate Statutory title.

register of sasines, the heritable properties and securities specified in such inventory shall by virtue of this Act and without the necessity of any further conveyance be deemed and taken to be validly transferred to and vested in the General Trustees as if a disposition or assignation by the person or persons in whom the said heritable properties or securities were vested had been granted in favour of the General Trustees and had been recorded in the appropriate register of sasines;

Title deeds, &c., to be made available.

- (e) (i) The Clerk of Teinds shall make available to the General Trustees, so far as may be necessary for the purposes of this section, all or any title deeds, certificates, or other documents which are in his custody as keeper of the records of the Court of Teinds relating to any properties or securities specified in any such inventory;

And on completion to be handed over to General Trustees.

- (ii) Upon the completion of the transfer of any such properties and securities to the General Trustees, the Clerk of Teinds shall hand over to the General Trustees any title deeds, certificates, or other documents relating to the same which are in his custody as aforesaid upon a receipt therefor being given by the General Trustees;

[Provision for alteration of constitution, *supra*, p. 31.]

Trust purposes conserved.

- (g) The statutory properties and endowments of the parish transferred to the General Trustees under or by virtue or in pursuance of this sub-section shall, notwithstanding anything elsewhere in this Act contained, be held by the General Trustees for the

same ends, uses, and purposes as those for which they were held by the trustees or other persons in whom they were vested prior to their being so transferred.

Sec. 34 (2) contains the provisions applicable to the case of a parish *quoad sacra* erected after the passing of the 1925 Act, and they are these—

Quoad sacra
parishes
erected after
28th May,
1925.

(a) The titles, deeds, certificates, and other documents of or relating to the statutory properties and endowments of the parish shall be taken in the name of the General Trustees;

Titles, &c.,
to be in name
of General
Trustees.

(b) The original deed of constitution shall be in such terms as the General Assembly, or any body to which the General Assembly may delegate the necessary power, may direct, and the General Assembly or any such body may subsequently alter the said deed or annul the same and grant a new deed of constitution in place thereof.

Control by
General As-
sembly over
constitution.

It is provided (sec. 34 (3)) that “nothing in this section shall apply to any permanent endowment secured from teinds” under sec. 13 of the New Parishes Act, 1844—this being the section providing for erection of parishes for Gaelic-speaking people, to which no territorial district is necessarily attached (see *supra*, p. 23). But in regard to such endowments Part I. of the Act of 1925 will in general be operative.

Provisions
for certain
Gaelic-speak-
ing charges.

As already indicated, the churches and manse of these parishes, which are enumerated in the Eighth Schedule of the Act of 1925, are to be dealt with under that Act by means of schemes to be framed by the Scottish Ecclesiastical Commissioners, called into being under sec. 20, by virtue of the power given to them (sec. 21 (c)) to frame such schemes “for the transfer to the General Trustees of the churches and manse mentioned in the Eighth

Schedule.” The operative clause governing the exercise of their powers is sec. 24, which is as follows:—

24. With respect to the churches and manses of the parishes *quoad omnia* mentioned in the Eighth Schedule to this Act, the following provisions shall have effect:—

As soon as conveniently may be after the passing of this Act, the commissioners shall inquire into all circumstances relating to existing rights of property in the fabrics and sites of the churches and manses of the parishes aforesaid, and to the maintenance thereof, whether under any existing titles relating to the said churches and manses or otherwise, and the commissioners shall thereafter by order provide for the transfer to the General Trustees of the fabrics and sites of the said churches and manses, and of all powers and duties with respect to the maintenance and repair of the said fabrics, and the allocation of sitting accommodation in the said churches.

The endowments of such parishes, so far as consisting of permanent endowment out of teinds, will fall to be dealt with under the provisions dealing with stipend payable out of teinds generally, *i.e.*, under Part I. of the Act; and so far as stipends have been payable out of the proceeds of the Exchequer payments mentioned in sec. (2) of the Seventh Schedule, they will be governed by the terms of the scheme issued by the Ecclesiastical Commissioners under sec. 39 of the Act of 1925, dated 26th June, 1926.

Provisions
for treatment
of certain
“parliament-
ary” charges.

Sec. 21 (b) similarly confers on the commissioners powers to frame schemes “for the transfer to the General Trustees of the PARLIAMENTARY CHURCHES AND MANSES” (see *supra*, p. 25), “under the provisions of the section of this Act relating to parliamentary

churches and manses.” That is, sec. 23, which is in the following terms:—

23. With respect to the churches and manses mentioned in the Tenth Schedule to this Act (which, together with any land, whether described as churchyard, glebe, or otherwise connected with the said churches and manses, are in this Act referred to as “parliamentary churches and manses”) the following provisions shall have effect:—

“Parliamentary” churches and manses.

As soon as conveniently may be after the passing of this Act, the commissioners shall inquire into all circumstances relating to existing rights of property in the fabrics and sites of the parliamentary churches and manses, and to the maintenance thereof, whether under the provisions of the Act 5 Geo. IV. c. 90, and any conveyance or other deed relating to any of the said churches and manses in favour of the commissioners under the said Act or under any decision of the Court of Teinds or otherwise, and the commissioners shall thereafter by order provide for the transfer to the General Trustees of the fabrics and sites of the said churches and manses, and of all powers and duties with respect to the maintenance and repair of the said fabrics and the allocation of sitting accommodation in the said churches.

The Gaelic-speaking parishes and parliamentary charges to which the foregoing provisions apply will be found enumerated respectively in the Eighth and Tenth Schedules to the Act of 1925, which is printed in the Appendix. (See App., pp. 586 and 587, and as to grants in aid of stipends, sec. 39 and Sch. VII. (1) of the Act of 1925, and scheme of the Commissioners of 26th June, 1926.)

CHAPTER II.

HERITORS.

Early use of
the word
"heritor."

THE expression " heritors " occurs in connection with responsibility for the provision or repair and upkeep of kirks and manses early in the seventeenth century. In the case of *The Kirk of Selkirk v. Stuart* (1628, M. 7913), indeed, the assessment for the repair of the kirk is said to have been " set down by the parochine." Two years later, in the case of *Lauder*, it appears too that the Presbytery of Ettilston (Earlston) ordained " the parishioners " to convene themselves to see what was necessary to be done to the church; " which being done," the narrative as given in the report proceeds, " they should stent themselves proportionally to the lands possessed by them within the parish. . . . The most part of the parishioners met and imposed upon every five-pound land within the parish 100 merks for reparation of the kirk: whereupon they raised letters and charged ' every heritor ' for his part. The good man of Galashiels, *being one*, suspended for his part because he was not present at the laying down of the stent, and without his consent nobody could impose such a taxation upon him for such a use. Yet the Lords found the letters orderly proceeded in respect of the last Act of Parliament, 3rd James VI., Act 54, Parl. 1572." (*Kirk-Session of Lauder v. The Goodman of Gallowshiels*, 1630, Mor. 7913). In the Act of the Parliament of 1572¹ referred to, as well as in the Act of Privy Council of 1563 ratified by it, the word used is " Parochiners " (" Parishioners "). In *Faulkland* (1739, M. 7916) " the disposal of the area of the church was found to be in ' the heritors ' and not in the minister and Kirk Session." And in *Inverkeithing v. Lady Rosyth* (1642, Mor. 7914) the word " heritor " again appears. From that time onward it is commonly found.

¹ Cited as 1572, c. 15, in Alexander's Abridgement, p. 49.

In its primary meaning "heritor" is equivalent to an owner of land. (See *Peterhead Heritors, &c. v. Harlow*, 1802, 4 Pat. 356, per Lord Eldon, approved by Lord Justice-Clerk Moncrieff in *Downie v. M'Lean and Others* (Annan), 11 R. 47; *Heritors of Strathblane v. Glasgow Corporation*, 1899, 1 F. 523; affd. (H.L.) 1899, 2 F. 25). In the *Strathblane* case Lord President Robertson observed (1 F. 530): "Apart from decision, and considering the question merely on its merits, I suppose the word 'heritor' means 'owner of land.'" And in the House of Lords, Halsbury, L.C., said (2 F. (H.L.) 25): "It is admitted . . . that at all events what we call proprietorship will bring the person who is called the proprietor within the category of heritors under the ancient Act" (1663, c. 21).² "That is the starting point on which I found my judgment. I get rid of technical phrases, and I want to know who is the proprietor of the piece of land."

Primary meaning of "heritor"—
"owner of land."

But consistently with this, as will appear, this primary meaning is liable when the term occurs in an Act of Parliament to be controlled by the context in which it is found, being on the one hand extended, so as, *e.g.*, to cover any owner whose lands appear on the cess roll of the county in the case of assessments on the valued rent, or whose name and property appear in the valuation roll of the year, in the case of assessments on the real rent; or on the other, restricted, as, *e.g.*, by confining its scope to that one of two contemporaneous owners of different estates in the same piece of land on whom it seems appropriate to lay the particular assessment, or by excluding from assessment an owner whose source of profit is casual (*e.g.*, a mineral owner).

The following are examples of statutes in which the word "heritor" has been treated as being the

² Thomson's Acts, 1663, cited as c. 31; also in Alexander's Abridgement, p. 271.

subject of special definition, express or implied, modifying its primary meaning:—

Statutes in which its meaning has been held to be modified by context or scope of Act.

Under the Act 1663, c. 16, relative to vagrant poor, which provides that one-half of the assessment for the maintenance of the poor be paid by the heritors, and the other half by tenants and possessors—wad-setters and liferenters are declared to be liable “during their rights as heritors.”³

By the Act 1696, c. 26, for settling schools,⁴ a “heritor” is to have relief for one-half stent as against his tenants, and liferenters are to pay the proportion imposed on the lands they liferent, “and the heritors shall be always free of the same during the liferenter’s lifetime.” A liferenter, though liable, is therefore not a “heritor” under this Act.

By the Act 1707, c. 10,⁵ “heritor” is evidently limited to proprietors whose lands are separately valued on “the valuation of the paroch.”

By the Act 43 Geo. III. c. 54 (1802-3), relative to parochial schools, a “heritor” who votes at meetings under the Act is to be the proprietor of lands to the extent of at least £100 of valued rent as appearing in the cess books of the county.

The Act 7 & 8 Vict. c. 44 (New Parishes (Scotland) Act, 1844) requires for the disjunction of parishes the consent of the “heritors” of a major part of the value of any parish, and the meaning of “valuation” seems to be the same as in the Valuation Act, 17 & 18 Vict. c. 91, which supplied a general valuation on the basis of rent with the effect of extending the term “heritor” so as to embrace the owners of all heritable subjects upon the roll within the parish, a valuation being now attached to all. This roll is the basis of assessment in all parishes, except where the valued rent is the criterion of liability. “From the time when the Valuation Act came into force,” said Lord M’Laren in the *Strathblane* case,

³ Cited as 1663, c. 52, in Alexander’s Abridgement, p. 275.

⁴ *Ibid.*, p. 396.

⁵ *Ibid.*, p. 435.

supra, " I think that all interests in land separately entered on that roll are *prima facie* assessable for ecclesiastical rates, the case of leaseholds being an exception established by decision " (1 F. 533).

By 29 & 30 Vict. c. 71 (Glebe Lands (Scotland) Act, 1866) the word heritor is defined in sec. 2 as meaning " the proprietor of any lands within such parish to the extent of at least £100 of real rent from land yearly appearing in the valuation roll of the county within which such parish is situated " (sec. 2).

In practice a new division of heritors for purposes of assessment has arisen since the passing of the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868, viz., into what are called (1) " valued-rent heritors," and (2) " real-rent heritors." In the interpretation clause of that Act, " heritor " is declared to mean " any proprietor of lands and heritages at present liable in the assessments which may be imposed according to the real or valued rents thereof, as the case may be, for the purposes set forth in the third section hereof." The third section deals with the procedure (now superseded by the Church of Scotland (Property and Endowments) Act, 1925, *infra*) relative to " the building, rebuilding, repairing, adding to or other alteration of churches or manses, or the designing or excambing of sites therefor, or the designing or excambing of glebes or additions to glebes, or the designing or excambing of sites for or additions to churchyards, and the suitable maintenance thereof, including the building or rebuilding of churchyard walls." Sec. 23 of the Act of 1868 provides that all assessments for such purposes shall be imposed upon lands and heritages in the parish, according to the yearly value appearing on the valuation roll at the time the assessments are made, *or* according to the valued rent of such lands and heritages, as the case may be; " and such assessments shall be imposed and recovered ac-

"Valued-rent" heritors; "real-rent" heritors.

31 & 32 Vict. c. 96.

ording to the present law and practice.” Then follows this clause:—“Provided always, that when the area of any parish church heretofore erected has been allocated among the heritors according to their respective valued rents, all assessments for the repair thereof shall be imposed on such heritors according to such valued rent.” In other words, where a church had been built before 31st July, 1868, and the area allocated among the heritors according to their valued rents, the repair of that church was, in future, to be at the charge of the valued-rent heritors alone.⁶ As by far the greater number of churches in Scotland were built before the passing of the Act and were allocated among the valued-rent heritors, the operation of this rule is very extensive. It ceases, however, to be operative when a new church comes to be necessary. Its operation one way or the other may also be excluded, or on the other hand confirmed, by the establishment of a customary basis of liability following on an old decree, or by agreement or arbitration. (See *Heritors of Kinghorn*, 1897, 24 R. 704; *D. of Abercorn, &c. v. Edinburgh Presbytery* (Dud- dington, 1869, 7 M. 875; 8 M. 733.) In this case Lord Adam expressed the view that the proviso of sec. 33 of the Valuation Act of 1854 corresponding to that under consideration only applied where the *whole area* of a church has been allocated among the heritors assessed on their valued rents, and was therefore in- applicable to a burghal-landward church, one-half of the area of which had been allocated to the burgh as such (24 R. at 711).

Incidence of liability for repair of church.

May liability for repair of the church be on the valued-rent heritors, and for repair of the manse be on real-rent heritors?

In some parishes the heritors have construed the above clause to mean that, although the repairs of the church are payable by the valued-rent heritors among whom the church sittings have been allocated, the liability for the repair of the manse may be shifted to the shoulders of the real-rent heritors—that

⁶ The provision of the Ecclesiastical Buildings Act is evidently taken from sec. 33 of the Valuation of Lands Act, 1854, which was left unrepealed.

is, of owners of property in the parish according to the valuation roll. It is therefore not unusual for a meeting of heritors according to the valued rent to be held in a landward parish to consider the repairs to the church, and a separate meeting of heritors according to the real rent to be held to consider repairs upon the manse. Difficulty has been caused in parishes owing to the sharp line of distinction which has been drawn between what is conceived to be two entirely different bodies of heritors. In the last edition the view was expressed (p. 52) that the liability for repair of the manse ought to follow that for the church, and therefore that where the area of a parish church built prior to 1868 had been allocated among the heritors according to the valued rent, there was only one body of heritors in that parish; and the same persons who were responsible for repairs upon the church were also responsible for the maintenance of the manse and for the care of the graveyard. The reasonableness of this was supported by the consideration that if heritors according to the real rent were called upon to pay for the repair of the manse of a church whose area has been allocated among heritors according to the valued rent, they would be put in the anomalous position of having to defray the expense of repairing the residence of the minister of a church in which they had no allocated seat, which would seem to be a hardship.

Considerations *contra*.

In the view of so eminent an authority as the late Sir John Rankine, however, it did not appear that the reasoning which regarded the present and immemorial state of possession in the church (the element apparently underlying the statutory provision noticed above) as the governing element in fixing liability for its repair "would apply to repairs executed on the manse" (Rankine, Land Ownership, ch. xxxvi., p. 673 of 3rd edn.). The provision of sec. 23 of the Act of 1868 is in terms directed only to assessments for the repair "thereof," *i.e.*, of the parish church. The

Though cogent logically do not seem conclusive.

liability for upkeep of the church and manse respectively differ in their statutory origin, and it would rather seem that the weight of authority is adverse to the application of the directions of the Act of 1868 to the case of repairs to the manse. In the case of *Trades House of Glasgow v. Govan Heritors* (1887, 14 R. 910), in which, the heritors having been in the habit of assessing on the same roll (that of valued rent) for repairs of church and manse, it was held that it was competent for them to do so, the Trades House indeed expressly contended that, so far at least as manse repairs were concerned, the assessment should be on the real rent. Neither the Lord Ordinary (MacLaren) nor the Inner House seems, however, to have attached any weight to this argument in the opinions delivered. But that case is not an authority against the competency of the heritors in suitable circumstances, having assessed on the real rent instead of assessing (as they elected to do) on the valued rent. And in the case of *Kinclaven* (1870, 8 M. 858), Lord Cowan (holding with the rest of the Court that it was not necessary to decide whether the statement by Dunlop of a general right in the heritors to impose on either valued or real rent at will was well founded) stated the rule established by previous authorities to be that "where equity as regards the incidence of the tax upon the assessable subjects within the parish cannot be secured by taking the valued rent, and can only be reached by taking the real rent as the basis of apportionment, this last must be adopted." He gave various instances where equity would lead to this result based on considerations affecting the incidence of the assessment. And in the particular case, that of an old landward parish into which had come a railway forming a substantial part of the valuation on real, but a trifling part of that on valued, rental, he and the rest of the Court sustained assessment on real rent for repairs of the manse. In *Downie v. M'Lean* (1883, 11 R. 47)

the principle of *Kinclaven* was approved and followed to the effect of sanctioning assessment for manse repair on the real rent in the case of a burghal-landward parish, in face of an argument as to the disparity which would so arise as between the incidence of such an assessment and the existing rights in the sittings of the church. Finally, in *Kinghorn* (1897, 24 R. 704), while the circumstances were held to render the *Kinclaven* decision inapplicable, its principle was approved; and Lord Adam treated that decision as founded on a principle of equity which he would apply where he found nothing to prevent him from doing so. It will probably be found in most instances in which heritors are likely to resolve on resort to assessment on real rent that the circumstances are such as to make this necessary to secure fairness of incidence. And it must not be forgotten that imposition of the assessment on real rent was a condition precedent of the relief given to smaller heritors under the Ecclesiastical Assessments (Scotland) Act, 1900; and that similarly imposition according to the real rent is now a condition of the corresponding substituted provisions for relief contained in sec. 28 (6) of the Church of Scotland (Property and Endowments) Act, 1925. The first consideration that it is only by resort to assessment on real rent that it is possible for heritors to secure this relief may very well be held to afford a sufficient basis of equity to entitle heritors (whose concern the matter is primarily) to adopt it in any case to which the provision of sec. 23 of the Act of 1868 quoted above does not extend. It is understood that the preponderant practice has for long been to levy assessments for repair or rebuilding of manses on real rent, even in those cases in which the provisions of sec. 23 of the Act of 1868 have applied to the repair of the church. Having regard to the views expressed in the *Kinclaven* case as to the guiding considerations as to incidence at common law of all ecclesiastical assessments, it does not appear that there

63 & 64 Vict.
c. 20, secs.
2 and 31.

15 & 16 Geo.
V. c. 33.

is room to complain of this as involving any departure from sound principle. (Cf. *infra*, pp. 75-78.)

Erection of
new church
for old.

31 & 32 Vict.
c. 96.

Where a new church had to be built to replace an old one which was in existence prior to the passing of the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868, and which had become unfit for use, then, although the area of the old building was allocated among the valued-rent heritors, it was well settled that the real-rent heritors were liable to be assessed for the rebuilding, and also for the upkeep of the new church, and of the manse, whether new or old. Equally had they a claim to be considered in the allocation of seats in the new church. The whole community being thus benefited, it was regarded as but right that the burden should fall on all the owners of property in the parish. (Cf. *Heritors of Peterhead*, 1802, 4 Pat. 356.)

Superiors are
not, as such,
heritors.

Superiors are not heritors (*Dundas v. Nicolson and Others*, July 2, 1778, Hailes' Decisions, p. 802; Mor. 8511) (Nesting). Of this case Lord President Robertson observed (1 F. 531) it is "not only a sound but an instructive case"; "a superior, although an owner of heritage, is not the owner of *land* in the physical and corporeal sense of that term." It is a question whether, if in feuing their lands they retain the minerals, superiors do not remain liable for parochial assessments; the point has not been decided, but see *Trades House of Glasgow v. Heritors of Govan Parish*, 14 R. 910.

Owners of
coal mines.

An owner of coal mines is not liable *qua* proprietor thereof for assessments for church purposes (*Bell v. Wemyss* (Inveresk), 1805, Mor., Kirk, Appendix 3), it being said that the profit derived by him by these mines is of the nature of casual profit as opposed to permanent rent.⁷ In the case of *Glasgow Corporation v. M'Ewan* (Strathblane) 1899, 2 F. (H.L.) 25, the House of Lords held (affirming the decision of the

⁷ But if his mines are worked from the surface within the parish, *quære*, is he not a heritor, and are not the works, &c., assessable as valued in the valuation roll?

First Division of the Court of Session, 1 F. 523) that, in a parish where a conduit was carried underground by virtue of grants of way-leave in perpetuity obtained from the proprietors of the land, the Waterworks Commissioners who had obtained those grants and who had laid the conduit were liable to assessment as heritors of the parish. The opinions of the judges of the First Division (whose decision was affirmed) deal exhaustively with the definitions given to the word "heritor." Regarding *Bell v. Wemyss*, *supra*, Lord President Robertson said: "Lord Wemyss certainly was the owner in fee of the *dominium utile* of land, unless coal is not land. But then the ratio of the decision was that the profit was casual and exhaustible, and that it was therefore wrong that coal should bear permanent burdens, although right that it should bear annual burdens. Whether this be a sound principle of exemption or not, it is enough for the present purpose that the ratio does not apply to the lands of the water company, for the ground of judgment is not that the lands were subterraneous, but that the profits were casual, which is not the case of waterworks" (1 F. at pp. 531-33). In the Sheriff Court case of *Sewell v. The Lanarkshire Tramways Company*, 1920, 37 Sh.Ct.Rep. 263, the principle of the *Strathblane* case was held inapplicable to ownership of tramways, in respect that the right to occupancy of the lands enjoyed by the undertaking had not the qualities of ownership, being neither exclusive nor perpetual; and the company was held not to be liable in payment of heritors' assessments.

Liferenters are not heritors (*Lady Anstruther* Liferenters. *v. Anstruther*, 1823, 2 S. 306). "The case of a liferenter is related in principle to that of the superior—both are cases of different persons having different interests in the same land, the assumption being that the land must pay, and the question being through whom? Plainly, both persons could not be liable—the question is, which? The Court held that

of the two the fiar and not the liferenter ought to bear a burden laid on for a purpose which had more of the element of permanent benefit than characterises the concerns of a liferenter. This seems very reasonable" (Lord President Robertson, *Heritors of Strathblane v. Glasgow Corporation*, 1899, 1 F. 531). (See, however, for an exceptional case in which liferenters are liable for assessment "during their rights as heritors," the Act 1663, c. 16 [52], "Concerning Beggars and Vagabonds," *supra*, p. 46.) Titulars are not heritors (*Relict of Minister of Ednam v. Laird of Wedderburn*, 1663, Mor. 8499; *Reid v. Commissioners of Woods* (Maryhill), 1850, 12 D. 1215).

Titulars.

Tenants.

Tenants are not heritors, even though they have leases of more than twenty-one years (*Miller v. Craig* (Neilston), 1769, 1 Hailes, 329), and appear on the valuation roll as proprietors. (See *M'Laren v. Clyde Trustees* (Renfrew), 1865, 4 M. 58; 1868, 6 M. (H.L.) 81.) As to the liability of proprietors of lands let under building leases of ninety-nine years, see *Traquair's Trustees v. Heritors of Innerleithen*, 1870, 9 M. 234. "It is difficult to call a leaseholder for ninety-nine years a heritor, if a leaseholder for nineteen years is not, and it would be impossible to hold a nineteen years' lease to make a man owner of the land let to him" (Lord President Robertson in *Strathblane* case, *supra*, p. 53).

Udal proprietors and feuars.

Proprietors of udal lands are heritors (*Dundas v. Nicholson* (Nesting), 1778, Mor. 8511); and so are feuars (*Boswell v. Hamilton* (Mauchline), 1837, 15 S. 1148).

Heritor need not necessarily be an individual; may be a company or other corporation.

The term heritor is not necessarily confined to individuals. It is used with equal correctness to describe an incorporation or a union of persons for business or other purposes, such as a railway company (*Anderson v. Union Canal Company* (St. Cuthbert's), 1839, 1 D. 648; *Macfarlane v. Monkland Railway Company* (Slamannan), 1864, 2 M. 519; *Scottish N.-E. Railway Company v. Gardiner* (Coupar-Angus), 1864, 2 M.

537), so long as they are owners of ground in a parish. This point has frequently arisen in the case of burghal and burghal-landward parishes. In the *Stranraer* case of 1836, the Lord Ordinary (Moncreiff) said: "There is no doubt that the incorporation of the burgh in this case constitute the heritors" (*M'Neel v. Robertson*, 1836, 14 S. 849; see also *Magistrates of Elgin v. Gatherer* (Elgin), 1841, 4 D. 25, relative to magistrates of a royal burgh; *Lockhart v. Lockhart* (Lanark), 1832, 10 S. 243; and *Downie v. M'Lean*, *supra*). In *Lockhart*, while the burgh was held to be a heritor for the purpose of the assessment, the question was expressly reserved as to the right of relief of the burgh against individual proprietors of lands within the burghal area. Lord Moncreiff's judgment in the case of *Downie*, while it does not affirm, seems to regard favourably the right to relief by assessment (11 R. at p. 52).

A heritor's liability is irrespective of his occupancy of a seat in the parish church. The Act of Privy Council and the Statute 1572, c. 15 [54], imposes the stent on the "parochiners" (here meaning the "heritors"); and this has been held to be irrespective of their occupancy of the church (*Farie v. Leitch* (Rutherglen), Feb. 2, 1813, F.C.). The doctrine has been questioned in the case of a burghal-landward parish (*Williamson v. Parishioners of Kirkcaldy*, 1685, Mor. 7914), from the Court finding that the heritors were liable for repair of the church, "unless they would quit their seats." It seems unlikely that the Court intended that by ceasing to use the parish church heritors would obtain freedom from ecclesiastical assessments. The language seems more that of a threat of deprivation of spiritual benefits, for at that time there was no choice of churches in a parish. At present in several burghal-landward parishes, from the multiplication of churches of various denominations it may well be that not a single heritor occupies his allocated seat in the parish kirk.

Liability does not depend on occupancy of a seat.

Position of
owners of
land in
portions dis-
joined *quoad*
sacra.

Heritors whose lands are situated in a parish erected *quoad sacra*, and to which these lands have been disjoined, were formerly sometimes supposed to be liable for the maintenance of the church in the parish *quoad sacra*, not in the old parish; see, however, *supra*, p. 16. But heritors of *quoad sacra* parishes erected under 7 & 8, Vict. c. 44, sec. 8, and probably heritors in all such disjoined parishes, are, it is now decided, not freed from liability for the parochial burdens to which they were previously liable (*Magistrates of Fortrose v. Maclellan* (Rosemarkie), 1880, 8 R. 124). In this case, in giving judgment Lord Curriehill said: "It is quite clear that the burden of maintaining the manse, &c., is not *inter sacra* but *inter civilia*, quite as much so as the payment of stipend, which in all such cases continues to be paid by the heritors of the lands disjoined to the minister of the parish from which they have been so disjoined."

Where lands are not disjoined *quoad civilia*, persons whose lands are in the parish *quoad sacra* remain heritors of, and are liable for, the assessments in the old parish.

In united
parish heri-
tors may be
jointly liable
for manse,
but separ-
ately liable,
each for one
church.

In some cases the manse of a united parish may be maintainable by the heritors of two parishes united therein who are yet separately liable for the kirk of each parish. Thus, in 1455, Chanonry was created into a burgh and united with the burgh of Rosemarkie, the two being called in combination the burgh of Fortrose. There was a church in each, the cathedral church of the diocese being in Chanonry and the parish church in Rosemarkie. Later, in a proceeding by *The Bishop of Ross v. The Parishioners of Rosemarkie*, the Commissioners of Teinds, after opposition, pronounced the following decree, dated February 2, 1670: "The Lords unites the kirks of Chanonrie and Rosemarkie, and appoints the minister of Rosemarkie and his successors to serve the cure at both kirks Sunday day about. The Lords, of consent of the Bishop of Rosse, declares the parishionairs

of Rosemarkie frie of the support of the kirk of Chanonrie *et e contra*." In an action seeking to enforce liability upon the heritors of Chanonry for repairs of the church, manse, and other ecclesiastical buildings of Rosemarkie, it was held that the meaning of the decree was that, while uniting the two kirks, the heritors of the two districts were to be separately liable each for the support of their own church, viz., the heritors of Chanonry for support of the cathedral church, and the heritors within Rosemarkie district for support of the parish church, and that, looking to the decree and what followed upon it, the heritors of Chanonry were exempt from assessment for the repairs to the church of Rosemarkie, although liable in so far as regarded the manse and other buildings (*Magistrates of Fortrose, &c. v. Maclellan* (Rosemarkie), 1880, 8 R. 124, *supra*).

Heritors act as a *quasi*-corporation in the management and disposal of parochial matters as to which they are entitled, at their own hand, to take action (*Boswell v. Duke of Portland* (Mauchline), 1834, 13 S. 148).

Heritors act
as a *quasi*-
corporation.

And a note of suspension and interdict against encroachment upon a church was held to be properly brought at the instance of "The Heritors of" [the parish] "and A. B., Clerk to and as representing said heritors" (*Heritors of Bathgate*, 1908, (O.H.) 16 S.L.T. 210, 646).

MEETINGS.

The occasion for holding a meeting of heritors may arise owing to—

- (a) A call by the minister *ex proprio motu*;
- (b) A requisition by the clerk to the heritors;
- (c) A requisition of the Presbytery;
- (d) An order of the Court; or
- (e) Necessity in view of anything to be done or agreed, or in consequence of anything done or agreed, or ordered to be done under or

15 & 16 Geo.
V. c. 33, sec.
28 (7).

in pursuance of sec. 28 of the Property and Endowments Act, 1925.

Under the law as it existed prior to the passing of the Property and Endowments Act, 1925, a meeting of heritors might (and still may) be called in any one of three ways.

Methods of
convening
heritors'
meetings.

By use and wont at common law such a meeting might be called—

- (1) By written notice from the heritors' clerk to each heritor, transmitted through the post office, or left at the heritor's residence.
- (2) By "edict"—i.e., intimation given from the pulpit of the parish church, or by the precentor, immediately before the dismissal of the congregation, written notices being also transmitted to the non-resident heritors (*Campbell v. Stirling* (Cadder), Mar. 4, 1813, F.C., aff. 1816, 6 Paton, 238).

If it was the minister who desired the meeting to be called, this second course was generally followed, and so also if the Presbytery directed the meeting to be called, unless some special procedure was directed.

31 & 32 Vict.
c. 96, sec. 22.

But by the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868, a statutory method of calling was provided, which since that date has generally been followed. Sec. 22 of that Act provided that—

- (3) Notwithstanding any law, statute, or usage to the contrary, meetings of heritors for any purpose whatsoever may be called in the following manner, that is to say—On the requisition of (a) the clerk of the heritors; or (b) of any heritor or heritors possessed (1) of lands yielding one-fourth part of the total real rental of the parish, as appearing on the valuation roll or rolls in force at the time, or (2) valued at one-fourth part of the total valued rent of the parish; or (c) when he himself thinks such meeting expedient or necessary,

the minister of a parish shall cause an intimation of the meeting to be given immediately after divine service in the forenoon, and circular letters containing a similar intimation to be sent to all heritors of the parish, at least twenty-one free days before such meeting takes place. Provided that where in any parish the number of heritors exceeds forty, it shall not be necessary to send circular letters, but in lieu thereof the minister may give intimation of the meeting by advertisement in a newspaper circulating in the county, once during each of two successive weeks between the intimation from the pulpit and the day for which the meeting is called.

It does not appear that a more frequent repetition of the advertisement would be warranted, and an item for the expenses of this might be objected to in an audit of the clerk's account—however desirable it occasionally may be, especially in landward-burghal parishes, to have more public and frequent advertisement of an important meeting. A meeting summoned for the purpose set forth in sec. 1 of the Ecclesiastical Assessments (Scotland) Act, 1900, was directed to be convened in the manner prescribed in the Ecclesiastical Buildings Act, sec. 22.

Finally, under sec. 28 of the Property and Endowments Act, 1925 (consequent on the provision therein made for relief of heritors in respect of a rental within the parish not exceeding thirty pounds sterling—as explained when dealing with assessments for the final repair of churches and manse), it is provided, for cases falling within the section, that whenever in any parish it shall be necessary in view of anything to be done or agreed, or in consequence of anything done or agreed, or ordered to be done under or in pursuance of this section to call a meeting of heritors, a circular letter containing an intimation of the meet-

63 & 64 Vict.
c. 20, sec. 1.

15 & 16 Geo.
V. c. 33.

Sec. 28 (7).

ing shall be sent twenty-one clear days before the meeting to every known heritor whose total rental within the parish as appearing in the valuation roll (whether such rental consists of one or more subjects) exceeds the sum of thirty pounds, and intimation of the meeting shall also be given by advertisement in a newspaper circulating in the parish once during each of two successive weeks and within the said period of twenty-one days.

Relieved heritors not entitled to vote in applications under sec. 28 regarding ordering of repairs, &c.

By sec. 28, sub-sec. (6) (*d*), it is provided that no heritor, who by reason of any exemption or deduction allowed by this sub-section is relieved altogether from assessment in respect of the execution of any repair, or in respect of any payment by the heritors in lieu of repair, shall be entitled at any meeting of the heritors to take part in the discussion of, or to vote upon, any question concerning any plans for or the execution of the said repair, or the defraying of the expenses of the same, or any question concerning an agreement involving payment by the heritors in lieu of repair.

How notice should be given in special cases.

Notices addressed to public companies or corporations should be addressed to the secretary or clerk or other officer at the principal office, or the office specified in the Articles of Association, Act of Parliament, or charter, as that whereto notices may be legally sent.

Notices intended for insane or pupil heritors should be sent to their guardians; but, to prevent any possible question, notices may prudently also be sent to the parties themselves. Although such heritors cannot act by reason of incapacity, their lands are still liable to assessment, and the fullest opportunity should be afforded to their guardians of acquainting themselves with the position of matters in the parish.

Preservation of evidence of notice.

Questions have arisen as to the fact of notices being duly issued, and the clerk is advised either to send all notices in registered envelopes, or to prepare a special list of heritors and their addresses, and have a certificate of postage endorsed on it, and signed

either by himself or by two clerks present at the actual posting. The *induciæ* of citation to heritors' meetings under the Ecclesiastical Buildings Act and the Property and Endowments Act is twenty-one free days (sec. 22 of the former and 28 (7) of the latter Act). While it may be that a shorter citation is competent for meetings not called under the provisions of these Acts, the clerk should err on the safe side, and, except in some case of special urgency, should give twenty-one days' clear notice.

In the case of *adjourned* meetings the opinion has been expressed that the safe course to follow is to treat an adjourned meeting as substantially similar to an original one, and to give the same notice. It is true that if the provision as to twenty-one days' notice applies to adjourned meetings, it may have the effect of inconveniently retarding the despatch of business at heritors' meetings. This has been felt in practice. There is no statutory provision as to adjourned meetings, and there seems no reason for importing so stringent a rule as applies to original meetings—provided always that full notice of the adjournment, of the new place of meeting, date, and continuation of subject be given in the same way by notice from the pulpit and circular; or, where applicable, by advertisement. In the *Mauchline* case a meeting of heritors was adjourned from 17th August to 14th September, and on 14th September to 28th September (*Boswell v. The Duke of Portland*, 1834, 13 S. 148); but the Court apparently did not regard these adjournments as at all incompetent.

Care should be observed that no matter is imported into an adjourned meeting of which notice was not given in the notice of the original meeting.

The following is a suggested form of advertisement or notice of meetings:—

PARISH OF A.

I hereby call a meeting of the *Landward* Heritors of the Form of
notice.

Parish of *A*, to be held within *the Parish Church*, on
at o'clock, for the following purposes:—

First.—

Second.—To receive and consider Report by the Clerk to the Heritors relative to *the assessments for parish purposes*, and, if so resolved, *to impose an assessment*.

Third.—To transact any other business competent to be considered by the meeting. C D, *Minister of A Parish*.

The minister's certificate is as follows:—

I certify that I duly read the above citation immediately after divine service in the forenoon of Sunday, 6th January, 1901. C D, *Minister of A Parish*.

If the citation is read by any one but the parish minister, the certificate will run thus—

I certify that the above citation was read immediately after divine morning service, &c.

C D, *Minister of A Parish* (or as the case may be).

Place of
meeting.

The place of meeting is usually the parish church. There is, however, no special reason why it should be so. Any public hall, or other convenient place, in the parish is quite competent.

Quorum.

There is no statutory quorum, and if the heritors have been legally convened a meeting is constituted by the arrival of a single heritor. In the case of *Mauchline* one heritor alone attended an adjourned meeting of heritors when the repairs of the church were determined upon. Three other heritors ultimately signed their names as concurring (*Boswell v. The Duke of Portland*, 1834, 13 S. 149). But although such concurrence may very properly be taken, it is not essential. Regard, however, must be had to the qualifications of the heritor or heritors constituting a meeting when an assessment is imposed on the valued rent, in view of the provisions of the Ecclesiastical Assessments Act, 1900, sec. 1, and the Property and Endowments Act, 1925, sec. 28 (6) and (7).

Procedure at
meetings of
heritors.

The first business of the meeting is to appoint a preses. There is no person entitled to claim to preside. If the appointment is not (as is usually the

case) unanimous, the election must be decided by a vote, and in deciding this matter each heritor has one vote and no more, it is thought, whether he represents absent heritors or not.

The clerk to the meeting is then appointed. There is usually a regularly appointed heritors' clerk, who will act as clerk to the meeting (see Chapter III., *infra*, "The Heritors' Clerk"). He need not be either a heritor or a parishioner. He is sometimes also clerk to the kirk-session, but the offices are quite distinct. As heritors cannot be too careful in procedure, it is desirable that, wherever it is possible, a solicitor should be appointed clerk. If there is no regular clerk to the heritors, the election of a clerk to the meeting is conducted in the same way as that of the preses.

Clerk to meeting.

The clerk reads the advertisement calling the meeting and the certificate by the minister of citation from the church pulpit, and lays on the table copies of the newspapers containing the advertisement. In the case of a meeting called by circular, the circular will be read, and it is advised that a certificate of postage to each heritor should be laid on the table.

Procedure.

The clerk takes note of the names of all present. Absent heritors may be represented by proxies (*Robertson v. Murdoch* (Barony), 1830, 8 S. 587), which should be valid mandates, and be stamped with a penny stamp (54 & 55 Vict. c. 39, sec. 80). Women may attend and vote, or may grant proxies. At a meeting of heritors called for the purposes of the Glebe Lands Act, 1866, an absent heritor may vote by a letter under his hand. Husbands have been accustomed to attend on behalf of their wives without proxies. The propriety of this general custom as the law affecting married women now stands appears to be very doubtful. It seems more than probable that a minor "on the verge of majority," but having curators, can attend and vote. (Cf. *Boswell, supra*, 13 S. at p. 148.) A minor with curators cannot vote

Who may attend as, or for, heritors.

(or grant a mandate) without their concurrence, and a mandate or vote by a curator alone is inept (*Campbell v. Stirling, supra*).

Persons acting as commissioners or factors of estates which are the property of minors are by custom allowed to vote. The commission or factory should be produced, particularly if the meeting be called for the purpose of imposing an assessment.

Minister is
not *as such*
a heritor.

The minister *as such* is not a heritor. He is not entitled to be present except by invitation; it is not unusual for him to attend, but of course he cannot preside, he cannot vote, and he is not entitled to speak unless invited to do so by the meeting. The minister is often well qualified from his knowledge of parochial affairs to advise with the heritors, but he will best consult the dignity of his office by not tendering counsel unless he is requested to do so.⁸

The clerk reads the minutes of the previous meeting of heritors, and of any meetings of committee of heritors. These minutes, if approved, and if not already signed by the chairman of the meetings to which they relate, should be signed in presence of the meeting at which they are read by its chairman. Confirmation of the minutes is not necessary to make a resolution in the minutes operative (cf. Muirhead, *Law of Meetings*, 1920, p. 90).

Procedure.

The preses explains the business of the meeting, preserves order, determines the relevancy of motions or amendments, and takes the sense of the meeting by vote. Voting papers are not necessary. If voting papers are used they must be stamped (Stamp Act, 1891, 54 & 55 Vict. c. 39, sec. 80; and see as to a voting paper executed abroad, 7 Edw. VII. c. 13, sec. 9). The recognised manner of voting, however, is by open vote.

⁸ There seems to be no reason why the minister should not attend as mandatory for an absent heritor if duly authorised; and as matter of practice his attendance in this capacity is not unknown. But if the matters to be dealt with are in their nature contentious, it seems inexpedient that he should attend and take an active part in the proceedings even in a representative capacity.

Should objection be taken to the enumeration of heritors by show of hands or standing and counting, the legal mode of ascertaining the vote is by calling the roll (per Lord M'Laren in *Black v. Tennent*, 1 F. 423).

It was decided (*Campbell v. Stirling* (Cadder), *supra*), that a preses has a deliberative but not a casting vote. The case is an old one, and the manifest inconvenience of such a rule in the case of an equality of votes points to the desirability of the preses having also a casting vote. The point has been raised, but not decided, whether a meeting can voluntarily, as a condition of the preses' appointment, give him a casting vote. As the heritors present are, or are presumed to be, the whole parties interested, it has sometimes been thought that they can confer such a power but at common law this seems to be doubtful. (See Grant On Corporations, p. 219, n. (d); and the opinion of Cave, J., in *Nell v. Longbottom*, 1894, 1 Q.B. 767, at 771, as at all events an illustrative authority; and Muirhead, Law of Meetings, p. 78.) But there seems no reason why, if on a test vote there should be equality, the meeting should not agree that it will on a final vote accept the motion for which the preses casts his vote.

Absent heritors are bound by the actings of those present, if all is done in strict conformity with the law (*Goodman of Gallowshiels*, 1630, Mor. 7913; *Boswell v. Duke of Portland* (Mauchline), 1834, 13 S. 148). For circumstances in which it was held (aff. judgment of Court of Session) that a heritor whose land had been compulsorily taken as an addition to the churchyard was not entitled to have the proceedings set aside on the ground of want of notice, see *Walker v. Presbytery of Arbroath*, 1876 (Barry), (H.L.) 4 R. 1 (Court of Session, 3 R. 498).

When an assessment is proposed to be imposed, it is the duty of both the preses and clerk to be well advised both as to the competency of assessing for the purpose and as to the mode or rate of assessment.

Business
competent
to heritors'
meeting.

The business competent to a meeting of heritors was formerly of a varied kind. Any questions as to the church, churchyard, or manse could there be properly raised and discussed, and assessments for their repair or protection imposed; the collector of such assessments has usually been the heritors' clerk, but any other person may be appointed. If any heritor is aggrieved by any resolution, his remedy is by action in the Court of Session. As the heritors meet as a civil body, there can be no doubt that recourse to the Presbytery, which is an ecclesiastical Court, is incompetent.

Can a resolu-
tion once
passed be
rescinded?

Can a body of heritors rescind a resolution come to at a previous meeting? If nothing of a practical nature has followed upon the first resolution, and things are in fact in the same position as they were formerly, the heritors are probably entitled to rescind their resolution. Where, however, anything has followed upon a resolution, such as the incurring of any expense connected with carrying out such a resolution, or a contract entered upon, the second resolution appears voidable if parties interested insist on implement of the first resolution, or is only competent where the parties instrumental in carrying the second resolution become liable for the loss incurred through the heritors' change of mind.

Cathcart
(1925) case.

This view, expressed in the last edition, has recently been substantially confirmed by the decision of Lord Blackburn in *Gordon v. Cathcart Real-rent Heritors*, 1925 S.L.T. 125, p. 131. His lordship says, "It was argued for the defenders that the heritors, being a corporate body, are entitled like any other corporation to change their minds and rescind all prior resolutions come to by them.

"The question has never, so far as I am aware, been the subject of judicial consideration. It is stated in Duncan's Parochial Law (Johnston's Edn., p. 531) that it was raised in the case of *Newtile (Whitton v. Lord Wharncliffe, 1869, unreported)*,

where, as here, the original resolution was to rebuild instead of repair a church; but the question was withdrawn by consent of parties.

“ I have already stated my opinion that in domestic matters the heritors are entitled to change their minds and to give effect to their second thoughts by rescinding a prior resolution. They may, in my opinion, do so in such domestic matters, even if the effect of that rescinding resolution be to create a claim of damages against the heritors by a third party, *e.g.*, by a resolution dismissing the heritors' clerk without good cause, and without any notice. . . .

“ Although (such) a resolution would be binding on the whole body of the heritors, it does not necessarily follow that the whole body would also become liable for the claim of damages which would emerge. This liability would probably only fall upon the individual heritors who passed the rescinding resolution.

“ But where the original resolution dealt with a matter with regard to which the heritors had a public duty to perform which they might have been compelled to perform, even if they desired to avoid doing so, and by the resolution the heritors voluntarily undertook to perform that duty in a particular way, then I think that the question whether they can competently rescind that resolution must depend on the circumstances of each particular case. It may be . . . that where nothing of a practical nature has followed upon the first resolution, and *res sunt integræ*, it would always be competent for the heritors to rescind.

“ But I agree . . . that where such a resolution has been given practical effect to, and *res non sunt integræ*, then a counter resolution would be void. I think this would be so even if the counter resolution were passed by a unanimous vote instead of by a mere majority.

“ To hold otherwise would be to imply that there would never be any finality as to the heritors' inten-

tions even where they had come to a unanimous finding at a meeting to which the whole body has been duly convened, unless some of the persons interested were dissatisfied, and took steps at the time to have the matter definitely settled.

“ In the present case the original resolution was passed ten years ago, was confirmed in 1923, and has been followed by the conclusion of numerous contracts for the erection of a new church. . . . Under these circumstances, I do not doubt that it was outwith the power of the heritors to go back on all that has been done, and to relegate the question whether the church should be repaired or rebuilt to the same position as it was in ten years ago. The meetings . . . were advertised in the manner prescribed by statute, and the failure of the present defenders to attend and table their objections at these meetings cannot be excused by any Court of law either on the ground that they failed to notice the advertisements and intimations, or on the ground that they had failed to realise the obligations which they had undertaken in becoming heritors. . . .

“ But even if the conclusion I have reached that the rescinding resolutions were incompetent is wrong, that is not necessarily the end of the case. It is at least clear that the original resolutions could not possibly be reduced without full restitution being made. It is equally clear, in my opinion, that the burden of offering and making restitution must rest upon the heritors who supported the resolution to rescind, and are in fact defending this action, and not upon those who are willing to discharge the obligations originally undertaken by the heritors.”

Admission
of press
representa-
tives.

8 Edw. VII.
c. 43.

By the Local Authorities (Admission of the Press to Meetings) Act, 1908, it was provided that representatives of the press should be admitted to the meetings of any local authority except where such body resolves “ in view of the special business then being

dealt with or about to be dealt with " that temporary exclusion " is advisable in the public interest " (sec. 1). In Scotland the term " local authority " covers any local body, board, joint board, or committee which has or may have power to impose a rate, and which does not require to report its proceedings to any other local authority (sec. 6). The right of attendance given by the Act applies only to " representatives of the press " as defined in sec. 2; and its provisions neither extend nor restrict (sec. 5) any right of the public to be admitted to the meetings of such an authority.

By the Public Meeting Act, 1908, any person who acts in a disorderly manner at a lawful public meeting for the purpose of preventing the transaction of the business for which the meeting is called together is guilty of an offence punishable on summary conviction by a fine not exceeding £5, or imprisonment not exceeding one month; and any one inciting others to commit such an offence is guilty of a like offence.

Prevention
of disorder.
8 Edw. VII.
c. 66.

In the matter of a petition *Reid and Others, Petitioners*, November 9, 1897 (unreported)—the circumstances of which are very fully narrated in the last edition hereof—an interesting instance occurred of authority being given by the Court for the sale of a piece of land which had come to be vested in the heritors, under a title granted in favour of certain of the heritors of the parish of Springburn " as trustees for themselves and the other heritors " of the said parish of subjects, " which subjects are conveyed in trust to the end and intent that our said disponees as trustees foresaid may inalienably hold and manage the same in all time coming for behoof of the said parish of Springburn and of the parish church of the same." The parcel of land dealt with consisted of an area of 1640 $\frac{2}{3}$ yards of ground available for building purposes, which was part of ground conveyed for behoof of the parish church of Springburn parish,

Power to sell,
&c., land
vested in
heritors as
trustees for
parish
granted.

Springburn
case.

but was of no use as building ground for any extension of, or otherwise in connection with, the church.

The kirk-session accordingly, acting under the best advice at their command, came to be of opinion that the measure of highest expediency, with a view to the spiritual needs of the parish, would be the sale, or feuing, of the superfluous land, and the devotion of the price, or feu-duty, to the building scheme.

A meeting of heritors was thereafter convened in the parish church, when the proposals of the kirk-session were submitted. The heritors unanimously gave their approval thereto, and appointed a committee of their number, with a general authority to act in the heritors' interests. Thereafter a petition having been presented to the Presbytery of Glasgow as conservators of the benefice, the Presbytery also approved of the proposals as being in the best interests of the parish.

In these circumstances a petition was presented by the committee of heritors under the Trusts (Scotland) Act, 1867 (and particularly sec. 3), for power to feu the piece of ground, and to dispose thereafter of the feu-duty, or alternatively for power to sell said ground.

The Court ordered intimation to the moderator and clerk respectively of the Presbytery of Glasgow, and also to the minister of the parish of Springburn, as such and as moderator of the kirk-session of the parish, and to the session-clerk. Thereafter, after a remit by Lord Low (Lord Ordinary) to a Writer to the Signet and to a land valuator to inquire into the circumstances, the Court, having before it reports from these gentlemen, granted authority as craved to feu 1640 $\frac{2}{3}$ square yards at a minimum feu-duty of £41 per imperial acre, and thereafter to sell the feu-duty, or alternatively to sell the piece of ground, and to expend the proceeds of the sale of the feu-duty or ground as the case might be upon the alterations, additions, and buildings proposed in con-

nection with the Springburn Parish Church and Congregational Hall mentioned in the petition.

HERITORS' ASSESSMENTS.

The observations of Lord Chief Justice Tindal in *Veley and Another v. Burder*, 1841, 12 Ad. & Ell. 265, on the common law of England, are quite applicable to the obligations of heritors in Scotland—
 “The repair of the fabric of the church is a duty which the parishioners are compellable to perform, not a mere voluntary act which they may perform or decline at their own discretion; the law is imperative upon them that they do repair the church, not binding on them in a qualified limited manner only, that they may repair or not, as they think fit; and where it so happens that the fabric of the church stands in need of repair, the only questions upon which the parishioners, when convened together to make a rate, can by law deliberate and determine, is not whether they will repair the church or not (for upon that point they are concluded by the law), but how, and in what manner, the common law obligation so binding them may be best and most effectually, and at the same time most conveniently, performed and carried into effect.”

Common law duty of maintenance of fabrics of church and manse expounded.

In a landward or rural parish the assessment was usually imposed on the valued rent, and under the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868 (31 & 32 Vict. c. 96), an assessment for the repair of a church built prior to 31st July, 1868, the area of which has been allocated among the heritors according to their respective valued rents, must be imposed on such heritors according to the valued rent. Allocation may be inferred notwithstanding the absence of a decree or agreement (*Duke of Abercorn, &c. v. Presbytery of Edinburgh* (Duddingston), 1869, 7 M. 875; 1870, 8 M. 733). The question has been already discussed whether the manse and churchyard

Practice as to assessments.

walls are for this purpose to be regarded as pertinents of a church having an allocated area (*supra*, pp. 48-52). There are parishes without such allocation of seats which by long custom impose assessments for church repairs on the valued rent. The Ecclesiastical Buildings Act, 1868, did not make such assessments illegal; and the Ecclesiastical Assessments (Scotland) Act, 1900, leaves it to the decision of the heritors of a parish where recourse to the real rent would be competent, although their "previous use and wont" has been to use the valued rent as the basis of assessment, whether they shall continue to impose assessments on the valued rent or not. If a majority of not less than two-thirds in value of valued-rent heritors, voting personally or by proxy, resolve that the assessment shall be imposed according to the valued rent, then such assessment shall be imposed according to the valued rent, any law to the contrary notwithstanding. It is thought that this Act would not, however, enable a parish, the heritors of which have imposed assessments on the real rent, to revert to the valued rent unless with the unanimous consent of the heritors concerned. Sec. 28 of the Church of Scotland (Property and Endowments) Act, 1925, makes certain provisions (see *infra*, pp. 108 and 109) governing cases in which assessment is imposed on the real rent; but the competency of imposing the assessment according to real rent still falls to be regulated by the law as it stood prior to this Act, although the benefit accruing to heritors through doing so by reason of the provisions of the Act is probably a relevant factor for consideration.

63 & 64 Vict.
c. 20, sec. 1.

In a burghal
parish assess-
ment on real
rent is rule.

In a burghal parish the church had to be built and maintained by assessment (where assessment was necessary) on the real rent. In a burghal-landward parish the cost of building a church fell to be defrayed by assessment on the real rent since the case of *Peterhead* (a burghal-landward parish). There the Court

of Session found that a new church should be built, and that the expense of building as much of the church as was necessary for accommodating the landward part of the parish should be defrayed by the heritors according to their respective valued rents, and the expense of the remaining part should be defrayed by the feuars and proprietors of houses in the town of Peterhead according to their real rents. On appeal, the House of Lords "ordered and adjudged, there being no custom to regulate the proportion in which the heritors are to contribute to the rebuilding the church, the interlocutors complained of be reversed, in so far as they assess the rate at which the parishioners are to be charged to the rebuilding the church. And it is hereby declared that such charge is a parochial duty, and that it ought to be defrayed by all the owners of lands and houses in proportion to their real rents" (*Harlow, &c. v. Governors of the Merchant Maiden Hospital, &c.*, June 24, 1802, 4 Paton's Ap. 356).⁹ Lord Chancellor Eldon's discussion of the principles applicable to the incidence of the charge for building a new church where an urban area had come into existence will be found quoted at length in the last edition; but owing to the provisions of the Church of Scotland (Property and Endowments) Act, 1925, this question has become academic, so that it has not been thought necessary to reprint the passage. For the same reason other decisions canvassed in that edition on cognate matters have either been omitted or condensed. Reference is made to the third edition for fuller particulars of these.

In the case of *Mauchline* (1837) the heritors of the parish were assessed in proportion to their valuation for rebuilding a parish church, and no portion of the assessment was laid upon the feuars of the village or

⁹ A parochial duty is one to be discharged by "all"; it is incorrect, therefore, to impose an assessment on the real rent, "excepting feuars." An assessment must be either on the valued rent or on the real rent; heritors are not called on to make up a roll of their own with the view of freeing any particular class of persons in a parish.

town of Mauchline; it was not a burgh. One of the heritors refused payment, and the case came before the Court of Session. The heritor pleaded that the case of *Peterhead* settled a general principle, applicable to all cases where a parish, though partly landward or agricultural, contained a town or village population. The collector answered that Peterhead was a considerable town and Mauchline a minor village; further, the custom of assessing by valuation alone was that of the parish. The Court held that feuars were heritors, and that the principle of the case of *Peterhead* applied here. Lord Corehouse referred to Lord Eldon's judgment as contrary to the general custom of Scotland; Lord Eldon "did not direct that that proportion of the valuation of the county, which effeired to the ground of the town, should be taken as a cumulo valuation for assessing the proprietors of that ground, by subdividing it rateably among them in proportion to their real rents; but he took the real rents of all heritors, great and small alike, in town and county, and directed the assessment to be proportioned to that real rent. I think great inconvenience will result from adopting this rule of assessment as a general rule; but I do not see any ground on which the Court can refrain from adopting it here" (*Boswell v. Hamilton* (Mauchline), 1837, 15 S. 1148).¹⁰

17 & 18 Vict.
c. 91, sec. 33,
directed how
real rent to
be ascer-
tained.

The Valuation of Lands (Scotland) Act, 1854, provided, "where, in any county, burgh, or town, any county, municipal, parochial, or other public assessment, or any assessment, rate, or tax under any Act of Parliament, is authorised to be imposed or made upon or according to

¹⁰ See also the observations of the judges in *Hay v. Edinburgh Water Company*, July 13, 1850, 12 D. 1240; 1 Macq. (H.L.) 682: "It is true that it is a decision on the construction of a different statute," said Lord Kinnear in the *Strathblane* case, 1899, 1 F. at 533-4, "but still the question was in reality the same we are now considering, viz.—What is the true meaning of the words 'owners of lands and heritages'?" His lordship held that *Hay's* case decided that the principle to be observed was the equal rating of all persons who have a beneficial interest in works carried out under statute.

the real rent of lands and heritages, the yearly rent or value of such lands or heritages, as appearing from the valuation roll in force for the time under this Act, in such county, burgh, or town, shall, from and after the establishment of such valuation therein, be always deemed and taken to be the just amount of real rent for the purposes of such county, municipal, parochial or other assessment, rate, or tax, and the same shall be assessed and levied according to such yearly rent or value accordingly, any law or usage to the contrary notwithstanding; provided always, that when the area of any parish church heretofore erected has been allocated among the heritors, according to their respective valued rents, as appearing upon the present valuation roll, all assessments for the repair thereof shall be imposed according to such valued rents."

In the case of *Duddingston* in its first stage the Presbytery of Edinburgh decerned for the expense of the repairs of the parish church of Duddingston against the four valued-rent heritors of the parish, which contained a very large number of feuars. Two of the valued-rent heritors suspended a charge given them upon this decree, on the ground that, as the area of the church had never been allocated according to the valued rent, the assessment should have been imposed on all the heritors of the parish according to the real rent. The collector, besides defending the assessment on the ground that the assessment fell to be imposed according to the valued rent, pleaded that the valued-rent heritors, having from time immemorial borne the burden of repairing the church, were bound to convene the feuars as the parties mainly interested in the question.

The Court repelled this plea, and sisted process for a time in order that the collector might institute such proceedings as he might be advised to institute with the view of bringing into Court any parties interested or considered to be interested in the litigation (*Duke of Abercorn, &c. v. Presbytery of Edinburgh*

Duddingston
case.

(Duddingston), 1869, 7 M. 875). The collector having declined to avail himself of the opportunity, the case was reheard (*Duke of Abercorn, &c. v. Presbytery of Edinburgh* (Duddingston), 1870, 8 M. 733). The Court refused a suspension of the decree, reserving to the suspenders any right of relief competent to them against the feuars. There were only four heritors in the parish, and they had been accustomed to let the seats in the area of the church and apply the proceeds in repairing the church and manse, making up any deficiency by a voluntary assessment among themselves in proportion to the respective amounts of their valued rent. The parish contains the burgh of Portobello, and the *quoad sacra* parish of that name. The suspenders argued that the Lands Valuation Act, sec. 33, required all parochial assessments to be levied according to real rent, except where there had been an allocation of the area of the church according to valued rent, and there had been no allocation here. The Presbytery replied that there had been a virtual allocation, and that had it been otherwise the Valuation Act was not conclusive; it was not a taxing Act (citing *M'Laren v. Clyde Navigation Trustees*, 1865, 4 M. 58). Lord Cowan observed that the importance to be given to the Valuation Act by both sides was overstated, as that enactment was carefully limited to assessments, whether municipal or parochial, authorised by any Act of Parliament "to be imposed or laid upon or according to the real rent of lands and heritages"; and its declared object was solely to fix that the real rent, when it was prescribed as the rule, should in every case be taken from the real rent inserted in the valuation roll. On the other hand, unless allocation can be proved, the proviso of the statute prescribing valued rent has no application.

Limited scope
of application
of Valuation
Act.

"Be it that if a new church was erected in this parish, the assessment would be on real rent. The case is entirely different when it is the question of repairs that requires to be provided for; and those

who have hitherto had, and will in time coming continue to have, the management of the church, and the possession and enjoyment of the area, by themselves or others under them, must bear the burden" (Lord Cowan, p. 742).

The circumstances in the case of *Kinghorn* (*Heritors of Kinghorn v. Provost of Kinghorn*, 1897, 24 R. 704) were peculiar. The parish church is very old. In 1761 the Court of Session held that repairs of the church and manse were customarily paid half by the burgh and half by the landward heritors, and that therefore the burgh "are lyable in the half of all the repairs on said kirk, manse, and office-houses in all time coming." The church is still standing, and the Court in 1897 held that the same rule of assessment as in 1761 must still subsist, viz., that one-half of the cost of recent extensive repairs and alterations should be paid by the burgh and one-half by the valued-rent heritors. Lord Adams and Lord Kinnear expressed the opinion that had the question been open the rule of the *Kinclaven* case (*infra*, p. 78) would have applied as to assessment on the real rent. "So long as this church lasts," said Lord President Robertson, "this and none other is the law of the matter. The decree necessarily applies solely to that fabric which was the subject of the action, and the area of which was divided. It has, and could have, no application to a new church, which might be built of a totally different size, and might be divided in entirely different proportions."

Distinction between repair and renewal as regards basis of assessment.

In the case of *Annan*, 1883, a parish partly landward and partly consisting of a royal burgh, an assessment for the repair of the *manse* was imposed on the real rent. In an action by the collector it was stated that the assessment was in accordance with the custom, practice, and usage of the parish. Defenders argued the valued rent was the proper basis—if the real rent were taken there would be the practical injustice that a person might be assessed for the repair of a manse who had no seat in the church. It was

Annan case.

held that the assessment for the repairs of the manse had been rightly imposed on the individual owners of lands and heritages in the parish (*i.e.*, not on the magistrates for the burghal portion), without distinction, according to their real rents as shown in the valuation roll (*Downie v. M'Lean* (Annan), 1883, 11 R. 47). The particular point of the defence mentioned does not appear to have been specifically dealt with, the Court's decision being sufficiently clear otherwise—the real rent being the basis of the parish assessment. Had the valued rent here been taken as the basis, the Glasgow and South-Western Railway and the Solway Junction Railway would have escaped assessment. The judgment was therefore consistent with the principle of the *Kinclaven* case (*Highland Railway v. Kinclaven Heritors*, 1870, 8 M. 858), already noticed (*supra*, p. 50), in which Lord Cowan, who gave the leading opinion said, “Whenever there is a body of heritors, or even one heritor, possessed of subjects assessable, but capable of being reached only by taking real rent as the basis of taxation, I apprehend the principle of the decided cases must be adopted as alone applicable to the circumstances of the parish.” In the case of *Nesting*, another purely landward parish in Shetland, with no railway passing through it, it was held (Lord Justice-Clerk Moncreiff dissenting) that in such a parish the assessment for alterations and repairs on a manse fell to be assessed upon the heritors according to the number of merks land (valued rent) held by them respectively, that having been the rule of assessment from time immemorial, and there being no special circumstances in the case to render that rule inequitable or the real rent desirable (*Bruce v. Bruce and Another* (*Nesting*), 1873, 11 M. 755). Under the Act of 1900 a parish like Kinclaven may, for repairs of the church, resolve to continue to impose assessments on the valued rent, notwithstanding such alteration upon the rural character of the parish as

Kinclaven
case.

is caused by large feuing operations or the erection of extensive works (sec. 1).

In the Sheriff Court case of *Malcolm v. Mackay* (Nairnshire), 1904, 21 Sh.Ct.Rep. 55 (Nairn) (in which the general mandate of the collector of the heritors to collect was held to be sufficient to entitle him to sue for and recover an assessment for rebuilding a manse), the opinion was expressed that the omission of some heritors from assessment did not nullify the rate, which in any event ought fully to cover the amount required.

In the case of *Webster v. Hendrie & Graham* (Lanarkshire), 1885, Guthrie's Select Sh.Ct.Cas. 81 (Larbert), Sheriff Lees decided that, on the sale of an estate, the proprietor, at the date of a resolution to repair a manse, not the proprietor when the heritors imposed the assessment to pay for such repair, was liable in the rate allocated on the estate. This seems to have been on the ground that heritors' assessments are not *debita fundi*, but are, as Professor Sir John Rankine puts it (Land Ownership, p. 626), "personal prestations incidental to the ownership of land." But in the case of *Malcolm v. Mackay*, cited *supra*, it was held that where an assessment for manse rebuilding had been spread over two years, the second year's rate, "in supplement of" the first year's, was prestable against a heritor entered on the second year's roll, though she was not a heritor when the first year's portion was enforced. The observations of the Sheriff (C. N. Johnston) may be usefully referred to. In *Blackford Heritors v. Roberts* (Perthshire), 1915, 31 Sh.Ct.Rep. 259, the principle that liability for such assessment is "a personal liability of the owner of land in a parish, arising from such ownership" was accepted. But on a heritor who was represented at a meeting which unanimously imposed an assessment for manse repairs which had been finished, being sued by the other heritors for payment of his share, although he maintained that he was not

In case of change of ownership during operations, who liable as heritor?

liable for part thereof because that part was required to pay a balance for work done before he became a heritor, he was nevertheless held liable to pay his full proportion, he having joined in the resolution to assess the body of heritors. In *Logierait Heritors v. Stewart* (Perthshire), 1913, 33 Sh.Ct.Rep. 76, the question again arose, uncomplicated by this specialty. A body of heritors resolved to repair the manse and assessed for one-fourth of the cost. Before a further instalment of the cost was assessed for, a heritor had sold his land in the parish, with no clause relieving the purchaser of impending assessments. A joint opinion was given by Sheriff C. N. Johnston and by Sheriff-Substitute Sym that the further assessment was payable by the purchaser as heritor at the time of its imposition.

63 & 64 Vict.
c. 20.

15 & 16 Geo.
IV. c. 33.

The Ecclesiastical Assessments (Scotland) Act, 1900—the provisions of which are now modified by and have to be read in the light of sec. 28 (6) of the Property and Endowment Act, 1925, which comes in lieu of sec. 3 of the Act of 1900—came into force on 1st January, 1901. Its definitions of “valued-rent heritor” and “real-rent heritor” have already been dealt with (*supra*, p. 47). It provides that where according to use and wont an ecclesiastical assessment would fall to be imposed according to the valued rent, but might competently be imposed according to the real rent, any valued-rent heritor may request the clerk to the heritors to summon a meeting of valued-rent heritors, and if at such meeting it is resolved by a majority of not less than two-thirds in value of such heritors, voting personally or by proxy, to impose the assessment according to the valued rent, “then such assessment shall be imposed according to the valued rent, any law to the contrary notwithstanding.”

Limits within
which the Act
operative.

It may first be observed that a parish containing a church built prior to 1868, the area of which has been allocated among the valued-rent heritors, is not

affected by the Act of 1900, so far as *repairs of the church* are concerned. And this is probably the case also even in the absence of formal allocation where by arrangement or custom valued-rent heritors have disposed of the area and have kept the church in repair (Duddingston, *supra*).

A church built in substitution of such a church would probably be regarded as in the same position as the church it replaces, if built without an assessment, and the area allocated in the same way as that of church of which it takes the place. Thus Lord Lothian provided a new church for Jedburgh, and the area of it was allocated as was the area of the old church (*Duke of Roxburghe and Others v. Miller*, 1877, 4 R. (H.L.) 76). This was done expressly on the ground that the transaction was in substance a contract of examination, and not the erection of a new church in place of one which had become incapable of repair. In like manner the present church of Govan was built without assessment, and was accepted by the heritors as identical with the old church, and the area was allocated by the Sheriff of Lanarkshire among the valued-rent heritors according to the allocation of the old church.

In the second place, the section assumes the existence of a roll of parochial valued rent, by means of which the exact two-thirds in value of valued-rent heritors is to be ascertained. The word "heritor" in relation to valued rent means, as we have seen, a landowner whose lands are entered on the cess roll of the county, though there is no connection between the cess or land tax and ecclesiastical assessments. By valued rent is meant a series of rentals made up by Commissioners appointed in the years 1643, and other years. The Act of the Convention of Estates of 23rd January, 1667, gave a supply which was to be raised on land according to the roll of 1660, and subsequent supplies were given on the same roll of valued rent. The land tax was at one time collected by the

What is a
"valued-rent
heritor"?

Meaning of
"valued
rent."

Lord President M'Neill
on the history
of valued
rent.

Commissioners of Supply, but by 6 & 7 Will. IV. c. 65 the collection of the tax was transferred from the Commissioners to the Crown. Lord President M'Neill observed, in the *Lord Advocate v. Commissioners of Supply for the County of Edinburgh*, 1861, 23 D. 933 at 649, that "the valued rent was ascertained at a distant period, and no power exists now of revising or correcting or altering that valuation. So that the tax is imposed according to a rental and a state of possession unsuitable to the present condition of matters. It was imposed according to the value of the subjects at the time and with reference to the possession by the parties at the time. The value is changed, the parties are changed, and the division of property is altered. It is not easy to ascertain all the parties who are now the proprietors of the several subjects as they then existed. The subjects remain, though differently arranged or distributed, and they have proprietors, though the proprietors are changed; but the relative values as at the time of the original valuation of the several lots as they are now distributed cannot be ascertained with certainty; that is impossible. But steps have been taken from time to time to have the properties of parties rated according to the old valuation. That was not a difficult matter for a certain time after the valuation, because evidence could then be obtained of what was their relative value at the time of the valuation; but in the course of some years that evidence was no longer attainable, and other modes were resorted to, which were held to give the nearest approximation possible to their original respective values. These modes were various. We used to see a good deal of them before the Act of 1832 which altered the representation of the people. There was a good deal of judicial discussion in regard to these matters in former times when the valued rent was the criterion of qualification for electors. And we know that when it was desired to divide between two or more proprietors of lands that had been valued

in cumulo the relative proportions of the old valuation, there were means of doing so. There was an application presented to the Commissioners of Supply, and upon the statement of one or more of the parties, those having interest—at least those whom the law regarded as having interest—were convened, and evidence was taken; and it was held as a general rule, the best perhaps that could be found, that the relative value at the date of the application was a fair criterion of the relative value at the date of the valuation. And so the Commissioners divided the valued rent. That was one mode. The proceeding was entered in the books and so appeared, and became matter of judicial record and procedure before the Commissioners. There was another mode, which was this: Where parties had arranged among themselves, at the transference of portions of lands, that the respective proportions of the valued rent were so and so; and if upon that arrangement the parties had paid the land tax and cess in that proportion, it was held that a certain length of time of such payment was to be taken as presumptive evidence either of the value at the time of the original valuation, or as a presumption that at some period a division had taken place, though no record of it remained. That was held to be another mode of ascertaining the proportions of valued rent. I do not know the precise time that was required to give that sanction to a use of payment, if indeed it was a fixed time. I think it varied, but it was such length of time as satisfied the Court that there was ground to conclude either that there had been a valuation, or that it was a fair criterion. There were other modes also as to arrangements between the parties. . . . But all of these, when they came to be dealt with in any way, became matter of judicial procedure and record before the Commissioners of Supply, and were so entered in their books; and thence the parties to whom these parcels of land belonged, and the respective values of the lands belonging to them, might to that extent be ascertained. But

where there had been no such procedure before the Commissioners of Supply, I do not know of any authority or power that the Commissioners of Supply had to obtain for themselves that kind of information, to set about an ascertainment of the present relative values of properties, or to compel parties to disclose the payments they had made, or to compel them to disclose the transactions which had taken place between them, or to show their titles. I am not aware of any authority for that. The earlier statutes certainly entitled them to ascertain the value; but that was at the time of making the valuation, and to enable them to value, and to correct irregularities, but it was not a permanent power. It was a power which only lasted for a short time; and thereafter all that the Commissioners of Supply could do was to divide *cumulo* valuations between parties on the application of the parties, or to do what they were moved to do judicially by the parties. The insufficiency of the power of the Commissioners of Supply to ascertain at their own hand the actual and relative values of properties is, I think, very clearly shown by the statute that was passed in 1854 for ascertaining the *real values* of the respective properties of parties throughout the country, and the new powers that were, for that purpose, then conferred on the Commissioners of Supply, and the new aid that was necessary to be given to them in order to enable them to accomplished that object."

After the passing of the Act 6 & 7 Will. IV. c. 65, dealing with, *inter alia*, the collection of local taxes in Scotland, although the collection of the tax was transferred to a Crown officer, the Commissioners continued to keep the roll carefully, partly because "rogue money" was levied in the counties according to the old valuation until the passing of the Acts 2 & 3 Vict. cc. 42 and 65 (by which rogue money came to be levied according to the real rent) and partly from custom. In the important case from which the above quotation is

made, it was decided that Commissioners of Supply were not bound to furnish annually to the collector of the land tax an assessment roll for that tax. It is to be feared that since that date the roll of valued rent has had a somewhat uncertain value. It is no one's duty to see to the keeping of it. The Commissioners of Supply continued to divide the valued rent when required by landowners until by the Local Government (Scotland) Act, 1889, sec. 102, the authority to do so was transferred to the Sheriff; but they had no other duty. The land tax is still collected from subjects situated in counties, though not from burghs since the passing of the Agricultural Rates, &c., Act, 1896. The roll used, however, is not necessarily uniform with the roll kept, or formerly kept, by the clerk to the Commissioners of Supply.

Sir Philip J. Hamilton Grierson, who at the time of the publication of the last edition was Solicitor to the Inland Revenue, was good enough to supply the following information as to the roll upon which the land tax is collected:—"There is in the hands of each collector of Inland Revenue a roll of the land tax of the county for which he is collector. These are the rolls, or copies of them, which were obtained from the clerks of supply after the collection of the tax was, under the provisions of 5 & 6 Will. IV. c. 64, transferred to collectors appointed by the Treasury. It is not the practice to make up a new roll for each year, but the collector notes on the roll in his hands the changes in ownership from such information as he can obtain. He, of course, gives effect to any decree of the Sheriff dividing the tax, and it is the practice, I understand, to give effect to any agreement by owners for division produced to him. As to division into parishes there is not a uniform practice. In some counties the roll is divided into parishes, but where there are proprietors having property in several parishes, these properties and the tax effeiring to them are usually entered together under the proprietor's name, and in these cases the proportion in each parish

59 & 60 Vict.
c. 16.

Present practice as to collection of land tax.

is not always shown. On the other hand, where a proprietor acquires additional property the separate entry may remain, his name being substituted for that of the former proprietor. These rolls, being in the hands of the collectors of Inland Revenue only for the purposes of the Inland Revenue, are not open to the public."

The case of *Robertson v. Murdoch*, 1830, 8 S. 587, decided that the mere absence of a proprietor's name from the cess roll did not prevent his being regarded as a heritor if he was truly a proprietor of lands. The cess roll now in use not being a public roll, the question arises in what way is the true valued rent of a parish to be ascertained so that what constitutes two-thirds in value of that rent may be known in order that sec. 1 of the Act of 1900 may become operative. It may be suggested that in cases where the valued rent (using that form of words as a technical expression) is the basis of assessment, it is probable that the Court would sustain the accuracy of the roll kept by the clerk to the heritors, if by admitted use and wont heritors had paid assessments upon the valued rent stated in such roll to be that of their lands. In *Durie's Trustees v. Ayton* (Dunfermline), 1894, 22 R. 35, where certain parties denied liability for heritors' assessments because, among other reasons, they had no notice of their liability, Lord Wellwood, Lord Ordinary (whose judgment so far as regards heritors' assessments was concurred in), said, "No doubt the reason why they were not cited was because the valued rent had not been split up and their names had not been entered in the cess books or the books of the clerk to the heritors of Dunfermline." The clerk's roll is usually kept with accuracy, but the clerk has, of course, no authority to divide valued rent, nor has he any means of knowing when it has been divided unless the heritor who has obtained a decree under the Local Government (Scotland) Act, 1889, sec. 102,

How is two-thirds in value of valued rent of period to be ascertained?

sends him the decree. As things stand, however, the clerk's roll is usually the best available evidence as to the valued rent of a parish. Whether it is to be accepted as conclusive as to the amount of valued rent in a parish so that a computation may be arrived at of what two-thirds amounts to, is a question which remains for decision. It is open to doubt, however, whether all the valued rent of 1660 is always represented in the clerk's roll. How properties omitted are to be restored, and when the roll is to be regarded as complete, may well engage the attention of those most interested. To make sec. 1 of the Act of 1900 effective, there must be found for each parish an authoritative roll of valued rent. For the purposes of the Act it may be sufficient that two-thirds of the valued rent as represented at the meeting (not an absolute two-thirds of the valued rent of the parish) resolve to impose an assessment on the valued rent; the section is not clear. So long as the matter remains of practical interest, it will be judicious, when a property is sold, for the agent of the seller to intimate the change of ownership to the clerk to the heritors of the parish in which the subjects are situated, and request him to record the fact in the heritors' roll. This applies only to lands which lie in a parish where assessments on the valued rent may be competently imposed (*infra*, pp. 92-93). (See Chapter III., Heritors' Clerk.) When heritors resolve to levy an assessment on any parish according to the real rent, the procedure introduced by the Ecclesiastical Assessments Act, 1900, must be followed, so far as the same has not been rendered unnecessary by reason of the provisions substituted for sec. 3 of that Act by sec. 28 (6) of the Property and Endowments Act, 1925 (for which, see *infra*, p. 109). A resolution to impose such an assessment having been agreed to at a duly convened meeting of heritors, intimation of such resolution is to be made to the Presbytery of the bounds and to the kirk-session of the parish. The Act is silent as to who

Roll of clerk to the heritors generally best evidence available of valued rent of parish.

Procedure in case of assessment on real rent.

63 & 64 Vict. c. 20, sec. 2.

15 & 16 Geo. V. c. 33.

is to make the intimation, but presumably the clerk to the heritors will send to the clerk to the Presbytery and the clerk of the kirk-session a certified copy of the resolution by registered post. "Thereafter" (the period is not specified) a scheme is to be made up showing the heritors proposed to be assessed and the amount of their respective assessments; and the scheme is to be open, free of charge, to inspection by any heritor or other party interested for a period of at least thirty days at some convenient place in the parish, and intimation of the place where, and the period for which the scheme is open to inspection, and the amount proposed to be levied on the heritor to whom it is sent, is to be made by circular letter sent by the heritors' clerk to all the heritors prior to the commencement of such period. The preparation of the scheme will be in many cases difficult. The valuation roll may be taken as its basis, omitting "lands and heritages occupied solely as the church and accessory buildings or burying-ground attached of any religious body in Scotland, or as the dwelling-house, with offices or garden or glebe land attached, of the minister of such church" (sec. 3, sub-sec. (1), of 1900 Act; now sec. 28 (6) (a) of 1925 Act). The expression "occupied solely as the church and accessory buildings . . . of any religious body" is similar to but not identical with that used in the Rating Exemptions (Scotland) Act 1874, sec. 1—"any church, chapel, meeting house, or other premises in Scotland exclusively appropriated to public religious worship." In construing this latter exemption it was held in *Trustees of College Street U.F. Church v. Parish Council of Edinburgh*, 1901, 3 F. 414, that church and mission halls sometimes used for temperance meetings and for congregational social meetings could not be regarded as *exclusively* appropriated to religious worship, and did not fall within the exemption. This appears from the judgments to have been on the ground that they never came within the scope of the exemption, not that they

The valuation roll may be taken as basis of scheme.

Exemption accorded to churches, &c.

37 & 38 Vict. c. 20.

What degree of use otherwise dis-qualifies?

were taken out of it by reason of the use of them. Reference may also be made to two Sheriff Court cases under the same section, in which the buildings were in the one case a church, and in the other case a mission hall, and so fell *prima facie* within the words of exemption, unless excluded by the use of them. In *Pollokshaws Town Council v. Pollok U.F. Church, &c.* (Renfrewshire), 1904, 20 Sh.Ct.Rep. 280, the church in question was found to be used for other purposes than public religious worship, and so not to be exempt. But in *Grieve v. Corporation of Greenock* (Renfrewshire), 1916, 32 Sh.Ct.Rep. 247, the fact that a mission hall, in which only religious services were admittedly wont to be conducted save for the challenged exception of the gratuitous supply therein of tea and teabread during some of these services, it was held that this use of the premises did not deprive them of the benefit of the exemption under sec. 1 of the Act of 1874. In applying these cases to the elucidation of the terms of sec. 3 of the Act of 1900, and of sec. 28 (6) (a), it must be kept in view that the words there used are “church and accessory buildings” (which, it is submitted, would include such halls as those of College Street U.F. Church), and “occupied solely as,” which may perhaps permit of a more elastic construction than the “exclusively appropriated to public religious worship” of the 1874 Act.¹¹

But the valuation roll, with the omission pointed out, does not give us the scheme on which the heritor is now to be assessed. For sub-sec. 6 (b) of sec. 28 of the Property and Endowments Act—coming in place of sec. 3 (2) of the Act of 1900—provides that the rental on which each heritor shall be assessed shall be his total rental within the parish as appearing in the valuation roll (whether such rental consists of one or more subjects) but subject to deduction of £30—(substituted for the £50 of the 1900 Act). In other words

Deduction
of £30 from
valuation of
each heritor ;

¹¹ See also *Queen's Park West U.F. Church v. Corporation of Glasgow*, 1927, 44 Sh.Ct.Rep. 13; *infra*, App., pp. 621, &c.

(as the deficiency is now in all cases to be met by the General Trustees—see *infra*, p. 109), no heritor of a real rental under £30 is liable in payment of assessment, and heritors of a real rent over £30 will receive relief of the assessment on the first £30 of rental where the assessments are imposed under the Property and Endowments Act. There may still be cases in which assessments may fall to be imposed or collected in respect of obligations incurred under to former law. In these the £50 limit will still apply; but it will be conditional on the provision of sec. 3 (1) of the Act of 1900 being complied with, *i.e.*, provided, or, in the language of the Act, “when” “the amount of the deficiency which would be created in the total amount of the assessment by allowing such deduction [of £50] to every heritor has been paid to the collector of the assessment by the kirk-session.” Upon this sub-section it may be observed that, although there is no provision in the Act for communicating the scheme to the kirk-session (as the resolution was communicated), it obviously must be so communicated, and until the kirk-session pays (not undertakes to pay) the deficiency caused by the deduction of £50, the scheme cannot be regarded as final. It will probably be best to incorporate the scheme by reference in the resolution to impose the assessment, and let the draft scheme accordingly accompany the copy resolution transmitted to the kirk-session, but there seems no reason for sending a copy of the scheme to the Presbytery, to whom, until the recent Act, no intimation has been made as to the intention of heritors to impose an assessment, and who have no control of the manner of assessment or over its collection. There is no provision for advertising that the scheme is open to inspection for at least thirty days, dating apparently from the issue of the clerk to the heritors’ circular letter. It is to be exhibited at some convenient place in the parish. In former times the

or, where assessment made under former law, £50, if conditions of 1900 Act satisfied.

Exhibition of scheme.

scheme would have been affixed to the church door; and where the door is protected from the weather there is no reason why it should not be placed there now, unless it be that it is seemingly not to be regarded as a public document but as one only open to inspection by a heritor "or other party interested," (a term which would certainly include a heritor's solicitor). How the scheme is to be rectified should any error be discovered is not stated.

In the Sheriff Court case of *Begg v. Williamson, &c.* (Midlothian), 1918, 35 Sh.Ct.Rep. 98 (Dollar), after a resolution of the heritors of a parish to assess themselves for repairs to the manse had been duly passed, the direction of the Act of 1900, sec. 2, that the scheme of the heritors and their respective assess is to lie open for inspection for thirty days was overlooked, and assessment notices were issued. One appearing in the valuation roll as a heritor refused to pay, and was sued for payment. Before action a scheme was duly exhibited, and new notices were issued. It was held that defence based (1) on the omission, and (2) the defender's wife being proprietor, although his was the name on the roll, must be repelled, and decree was granted.

In *Wright v. Craig* (Lanarkshire), 1905, 22 Sh.Ct.Rep. 26 (Mearns), the lands of Floak and Cairns in the parish of Mearns were entered on the cess roll at the annual rental of £100. On the heritors' list the lands of Townhead of Floak were entered at a valuation of £18 15s. 0d. It was proved that these lands were part of the lands of Floak and Cairns, and the defender as proprietor thereof was assessed for maintenance of the church. It was held that the onus of showing that the assessment had been made illegally was on the defender, and that it was not to be assumed that the subdivision of the lands of Floak and Cairns had been made illegally.

Heritor
totally re-
lieved may
not take part
in proceed-
ings relating
to work
assessed for.

Under the Act of 1900 provision was made (sec. 3) —which is carried forward into the Act of 1925, sec. 28 (6) (d)—that no heritor who by exemption under sub-sec. (1), or in respect of the deduction under sub-sec. (2), is relieved altogether from assessment in respect of the execution of any work, shall be entitled to take part in the discussion of, or vote upon, any question concerning any plans for or the execution of the work, or the defraying of its expenses. The question suggests itself, whether, if the total amount necessary to be raised is inaccurately calculated, or the amount collected under the scheme is not equal to the amount in the scheme, and a new resolution and new scheme are necessary to raise additional funds, a heritor who at the time of the second levy is the owner of property assessed at a greater value than at the first levy, and who therefore pays assessments on the second levy, though he paid none on the first levy, is to be debarred from attending a meeting of heritors and taking part in the discussion of, or to vote upon questions concerning the execution of the work for which he was not assessed under the first levy, but the defraying of the ultimate expenses of which work have brought him in under the second levy? There seems to be no reason why he should be so debarred, as in the event he is not “relieved altogether from assessment in respect of the execution” of the work.

15 & 16 Geo.
V. c. 33.

The law as it stood prior to the passing of the Property and Endowments Act, 1925, may be summarised as follows:—

Summary of
practice as to
imposition of
assessments
on valued and
real rent
respectively
prior to 1895.

(1) Burghal parishes; all assessments on the real rent.

(2) Burghal-landward and landward parishes.

(a) Rebuilding a church fell on the real rent, unless by use and wont ecclesiastical assessments had been imposed on the valued rent, and two-thirds in value of the valued-rent heritors resolved that the assessment

should be imposed according to the valued rent.

(b) Repairing a church fell on the valued rent if the church was built prior to 1868, and the sittings were allocated among the valued-rent heritors, or if, although the sittings were not allocated among such heritors, the heritors by use and wont had imposed assessments for the church's repair on the valued rent, and two-thirds in value of the valued-rent heritors resolved to impose assessments on the valued rent; if not, then on the real rent.

(c) Repairing a manse; the law was somewhat uncertain. If the manse was associated with a church built prior to 1868 of which the area was allocated among the valued-rent heritors, there would seem some arguable ground for holding that the assessment should fall on the same body of heritors as repair the church; the prevalent practice, approved of by the weight of authority, was, however, to assess the real-rent heritors for manse repairs under all circumstances.

(d) Rebuilding a manse fell on the real-rent heritors, unless it had been the use and wont to impose ecclesiastical assessments upon the valued rent, in which case two-thirds in value of the valued-rent heritors might resolve to impose the assessment on that rent.

(e) Churchyard walls, see (c) and (d).

Heritors may resolve to raise money for the erection, improvement, enlargement, purchase or acquisition of churches, churchyards and their walls, and manses, by annual assessments extending over a period not exceeding ten years; the assessments may be assigned to a lender willing to give the required

Assessment
over term
of years
competent.

amount on a bond and assignation in security. If there is only one heritor in the parish, he may follow the same course; but he must, in the first instance, apply to and obtain authority from the Sheriff of the county (Parochial Buildings (Scotland) Act, 1862, 25 & 26 Vict. c. 58, as amended and explained by 29 & 30 Vict. c. 75). Obviously this power is of practical interest only where the money immediately required under sec. 28 (1) can be borrowed on the security of the assessments, from the annual instalments of which repayment will fall to be made.

Valuation
roll is basis
of real-rent
assessment.

Assessments on the real rent should be imposed on the roll of real rent, *i.e.*, the valuation roll as it stood at the date when the heritors resolved, say, upon certain repairs, as distinguished from the roll of the year in which an assessment for the cost of such repairs became necessary. Thus if heritors resolved on 17th April to do repairs, the heritors would be assessed on the roll as it stood at 17th April. This is not inconsistent with the decision in *Maitland v. Maitland* (Cramond), 1877, 4 R. 422. For, while in that case it was held that an assessment imposed by consent of heritors, partly to meet debts previously incurred, partly to provide for the expenditure of the year following, could not be charged against the executor of a heritor who had died on 16th May, there had been in fact no operative resolution by a heritor's meeting. How far this rule of assessment warrants exaction of the assessment from one who has ceased to be owner at the date of actual imposition must be regarded as doubtful in view of the opinions expressed in the case of *Malcolm v. Mackay*, and other cases cited *supra*, p. 79.

Miscellaneous
points affect-
ing heritors.

Where Burgh Police Commissioners issued an order on a parish minister, as owner of the manse and glebe subjects fronting on a street, to pave a footpath in the street, and on his failure to pave it, executed the work, charged him with the expenses, and recovered these, and the minister sued the heritors

for relief, it was held in the Sheriff Court case of *Dunnett v. Heritors of Kilmarnock* (Ayrshire), 21 Sh.Ct.Rep. 260, (1) that he was the owner and that the heritors were not "owners"; (2) that the feuing of the glebe with the heritors' consent did not make them liable; and (3) that there was no right of relief. The judgment of the Sheriff contains some interesting observations as to the position of heritors with respect to manse and glebes.

In *MacDowell v. Lowrie* (Wigtownshire), 1908, 24 Sh.Ct.Rep. 331 (Stoneykirk), it was held that a parish minister is the owner of the glebe to the effect that he is bound to erect and maintain the fences along the marches of the glebe, conjointly with the neighbouring proprietors when called on to do so by any of them; and, in the second stage of the case, that the minister is liable, and not the heritors, in a question with the coterminous landowners for half the cost of repairing the march fences of the glebe.

When a heritor has objections to the legality of an assessment imposed on him by the heritors of his parish, he must state his objections *tempestive*, and not after the lapse of a term of years (*Trades House of Glasgow v. Govan Heritors*, 1887, 14 R. 910). Objection to assessments must be promptly stated.

In actions for unpaid assessments it is usual to ask interest at the rate of 5 per cent. per annum on arrears; the application in this regard of *Grieg v. The Magistrates of Edinburgh*, 1879, 6 R. 801, may, however, properly be considered as bearing on the rate of interest.

Prior to publication of the last edition an endeavour was made by its author to ascertain the state of the roll of valued rent in each parish. By the courtesy of the county clerks, he was favoured with information as to this in the case of twenty-nine counties, the purport of which was printed as a note to the chapter corresponding to this in that edition. Having regard to the very limited number of cases in which assessment on the valued rent is likely to Existing state of parochial rolls of valued rent kept by heritors' clerks.

have any practical importance in view of the provisions of the Property and Endowments Act, to be noticed in the following section of this chapter, it is not thought necessary to reprint this note. The *data* contained in it may be taken to be substantially unaltered since its publication, and those to whom the information may be of interest will readily find it on pp. 54-57 of the 3rd edition.

II. POSITION OF HERITORS UNDER THE CHURCH OF SCOTLAND (PROPERTY AND ENDOWMENTS) ACTS. 1925 (15 & 16 Geo. V. c. 33).

Changes made by 1925 Act will practically supersede the heritor as a factor in parochial ecclesiastical law.

When the changes for which provision is made by the Property and Endowments Act have been carried through to their full fruition, the *heritor*, as a factor in the parochial ecclesiastical law of Scotland, will have practically ceased to exist. But the nature of those provisions is such that the attainment of this goal must necessarily be spread over a considerable period of years. And in the taking of the steps leading up to it guidance must constantly be looked for in the rules which have been established, and which have down to the present regulated the rights and duties of the heritors in parochial ecclesiastical matters. It is for this reason that, in the preceding part of this chapter, so much has been retained expository of these matters. For to this those who are concerned in carrying through the transition stage will have constantly to look as well as to the new provisions with which this part of the chapter deals.

It now remains to state the scope of the changes introduced by the Property and Endowments Act, in so far as these affect *heritors* and their rights and duties. The detailed treatment of many of these will fall more appropriately under the chapters dealing with the specific subjects of the rights or duties of the *heritors* to which they particularly relate. Of

these merely the general lines will be indicated in what immediately falls—only these matters which do not call for such discussion elsewhere being here considered at length.

PART I. OF THE ACT.

This deals with the subject of stipend and teind, and incidentally affects a very radical alteration in the position of *heritors* in regard to both. Broadly speaking, the scope of the change provided for by the Act is as follows:—

Heritors in relation to stipend and teind.

At present a *heritor*, where the teind exigible from his land has not been converted into money valued and surrendered, is liable in payment of an annual amount of teind to the titular (who may or may not be the heritor himself), upon which amount the stipend is a charge payable by the heritor to the minister, and falling to be treated by him as a deduction from the amount of teind payable to the titular—teind and stipend alike (subject to the qualification above indicated) being nominally charged in victual, according to fiars prices. The amount of the charge thus varies from year to year. So far as stipend is concerned, the burden of increase falls upon, and the advantage of decrease enures to, the benefit of the titular. But while this is so in theory, in a large number of cases, the *heritor* has long ago acquired the ownership of the teinds charged upon his lands, subject, of course, to the liability, with which that teind was all along burdened, of the payment of the competent stipend which the law might apportion to the minister.

Common law relation of stipend to teinds.

As was observed by Lord Sands in his classical judgment in the case of *Galloway v. Lord Minto* (1920 S.C. 354), “substantial titularities in outside parties are now so rare that one is apt to lose sight of the fact that teinds are separate estate; and that, even

where a heritor has a title to his own teinds, he is in right of two properties—the lands and the teinds. The habit of mind of our ancestors was to envisage two persons, the titular and the heritor. Our habit is to envisage only one person to combine both characters.” It is obvious that when, as is generally the case, there is this combination of dual character in one person, as the heritor is his own creditor for the teind on which stipend is in theory a charge, the advantage or the disadvantage of the fluctuation of the charge will benefit or incommode the *heritor* himself. Such is the case at present in a very large number of instances. In practice the uncertainty of the annual amount of the charge has been felt to be inconvenient, both to the heritor, who has to pay, and to the minister who receives the stipend. And, quite apart from the recent movement towards union, the substitution of some more certain measure of liability had for some time past been looked upon as a desirable reform; and various efforts were made, but without success, to arrive at an agreed-on scheme to achieve this.

Fluctuation
of charge
irksome.

Substitution
of standard-
ised sum.

It has been possible to accomplish this object, in the Property and Endowments Act, by a series of provisions which will result in substituting liability for a standardised stipend of fixed amount, periodically payable half-yearly at Whitsunday and Martinmas by the heritors concerned, and charged upon their lands as a *debitum fundi* in place of the existing *debitum fructuum* measured in victual and of variable money amount. A detailed statement of the provisions affecting the time and method of standardisation and its results will find its appropriate place in the later chapter, which deals with the minister and his rights as such, including stipend. (Chap. X., *infra*; see pp. 416-430.) So that all that is necessary here is to indicate briefly the effect of the provisions upon the position of the heritor and his rights and liabilities.

Once the stage has been reached when the stipend

has been standardised, then as from the date of standardisation the standardised stipend will be payable by the heritors no longer to the minister direct but to the General Trustees of the Church of Scotland, a body created and incorporated by the Church of Scotland (General Trustees) Order, 1921, and whose powers are defined by that Order, and by secs. 37 and 38 of the Property and Endowments Act. (See *infra*, Chap. X., pp. 416-430.) The standardised stipend is declared to be payable to the trustees by the heritors half-yearly at the terms of Whitsunday and Martinmas, each half-yearly payment to be in respect of the half-year preceding the date of payment. But this is subject to the following exceptions, namely, that the first half of the standardised stipend for the year beginning at the date of standardisation shall not become payable until the term of Lammas in that year; and that the second half of the standardised stipend for that year shall not become payable till the term of Candlemas in the following year.

Standardised stipend payable half-yearly by heritors to General Trustees at Whitsunday and Martinmas.

As according to the scheme of the Act, the date of standardisation will always be a term of Martinmas, the result of this will work out in practice as follows:—Say, for example, that the date of standardisation is Martinmas, 1927, the (unstandardised victual) stipend for the crop and year 1927-1928 will still be payable after the separation of the crop and fixing of the fiars prices, that is, by Candlemas, 1928. The next payment will be at Lammas (1st August), 1928, being that of the standardised stipend applicable to the six months preceding Whitsunday, 1928, this being followed at Candlemas (2nd February), 1929, by the similar payment applicable to the half-year preceding the Martinmas, 1928. This will be followed by payment of another half-year's stipend at Whitsunday (15th May), 1929, being for the half-year preceding that date. Thereafter the payments will fall to be made by the heritor regularly half-yearly at each suc-

Sec. 8.
Sec. 3.

Special case of first year's stipend after standardisation.

ceeding term of Martinmas and Whitsunday, each payment being of the standardised stipend for the preceding six months. It will be observed that within one calendar half-year—that, from Martinmas, 1928, to Whitsunday, 1929—there will be payable the amount of two half-year's stipend.' This results from a certain overlapping which was involved in the change in the former customary dates of payment so as to make them correspond with the terms, Whitsunday and Martinmas, customary in other recurring yearly charges.¹²

Nature of
heritors'
responsi-
bility.

For these payments the heritor is responsible as for a personal debt until such time as the standardised value of the stipend shall have been constituted a real burden under subsequent provisions of the Act, or has been redeemed or extinguished as provided therein. Until either of these events takes place the General Trustees continue to have, as against the *heritor*, all the powers of recovery which according to present law and practice a minister has in respect of his stipend; but thereafter the position of the heritor with relation to the payment (if this is not redeemed or extinguished) will be merely that of a proprietor whose lands are charged with a real burden analogous as nearly as may be to feu-duty. These provisions for securing a standardised stipend, fixed once and for all in sterling money of course make it possible also to arrive at and modify the proportional fixed sterling charge applicable in respect of this to each existing estate within a parish; and accordingly provision is made for the preparation by the clerk of teinds for every parish in Scotland of a teind roll which shall specify in sterling money (a) the total teind of that parish; (b) the amount of that total applicable to the lands of each *heritor*; (c) the value of the whole stipend payable to the minister so far as payable out of teinds (including vicarage teinds payable as stipend and surrendered teinds so payable); and (d) the proportion of that value payable by each heritor in the parish.

¹² See further as to this, *infra*, Chap. X., pp. 428, 429.

There will thus be available records which can be kept up to date, from which can readily be ascertained the exact liability in money attaching in respect of stipend to any property in Scotland as at the date of the completion of the particular roll. The finality of the teind rolls for which provision is thus made is declared to be "subject to such alterations and adjustments as may be necessary in consequence of change of ownership and in consequence of redemption." Elaborate provisions are made by the Fifth Schedule of the Act for the preparation, issue, and adjustment of these teind rolls. It is unnecessary to incorporate these here, it being sufficient to refer to the text of the Schedule as contained in the print of the Act in the Appendix (*infra*, p. 579 *et seq.*) and to mention the special matters which more immediately concern *heritors*. Sch. 5 (8).
Teind rolls.

In case of a vacancy in a benefice, whether actual or constructive, arising out of the provisions of the Act (by which a benefice is deemed to become vacant in certain circumstances by the *election* of the minister or *notification* by the General Trustees, as well as by death or resignation, &c., of the minister), it becomes the duty of the *heritors* concerned forthwith to prepare and lodge in the teind office a state of teinds, unless in any case the Lord Ordinary shall, on the application of any party, dispense with this. It seems to be assumed that the heritors will know of the vacancy, the only provision for intimation being that the clerk of Presbytery shall intimate the vacancy to the clerk of teinds, who shall communicate the intimation to any titular who has previously notified him in writing that he desires to receive such intimation. In the adjustment of the roll, not only must the clerk of teinds give effect to surrenders made in accordance with the provisions of the Sixth Schedule of the Act 1925, but he may also give effect to an extrajudicial surrender made before the passing of the Act on intimation on behalf of the heritor con- Position on occurrence of a vacancy.
Sch. 5 (2).
Surrenders.
Sch. 5 (4).

cerned that such surrender has been made, supported by proper evidence.

Consolidation of entries applicable to one heritor.

Sch. 5 (5).

Where a *heritor* is entered in the teind roll separately for different subjects belonging to him in the same parish for teinds of the same class only, right is conferred on him to have the said entries or some of them consolidated into one entry; and it is provided that, on receiving from the heritor an application to that effect before the roll is made final, the clerk of teinds shall give effect thereto. It may, of course, be necessary as heretofore, in the course of the preparation of the roll, that a common agent should be appointed by the heritors concerned; and, where this becomes necessary, the practice hitherto existing in connection with such an appointment will fall to be followed by the heritors. It is competent for the titular to lodge a state of teinds and to elect to do so, but in that case the cost of the preparation of the state must be borne by the titular.

Sch. 5 (10).

Provisions for redemption or conversion into a standard charge.

The policy of the Property and Endowments Act required, however, something more far-reaching than the mere substitution of a standardised money sum in place of a fluctuating liability. It was desirable, in view of the leading purpose which its framers had in view, to abolish the obligation for stipend as a *debitum fructuum* creating a personal debt against the individual heritors. The first intention was that the liability should be in all cases redeemed by a payment (or transfer of consols in lieu thereof), which would yield an income equivalent to the amount of the charge. But difficulty arose in regard to this; and the Act as passed embodied what was in effect a compromise. The actual provisions will again be more appropriately considered in detail when dealing with stipend (*infra*, pp. 433 *et seq.*). But their general effect upon the position of the *heritors* concerned may be shortly explained here. The provisions draw a sharp distinction in treatment according as the standard

value (as shown by the teind roll of a parish) of the stipend exigible from the teind of any lands of a heritor in that parish *which are comprised in one entry in the teind roll* does or does not exceed the sum of £1 sterling. If it does, then the amount of the standard value is constituted, as at and from the first term of Whitsunday or Martinmas which shall occur after the date when the teind roll becomes final, a "standard charge" which is made a real burden on the lands from the teinds of which the said stipend is exigible in favour of the General Trustees and preferable to all other securities or burdens not incidents of tenure. The amount of this standard charge is payable at the like terms and the like periods as the standardised stipend of which it takes the place. This standard charge is redeemable as provided in sec. 12 (3) and (4) (*infra*, Chap. X., pp. 430-437).

Treatment differs according as the standard value of the stipend exigible from a heritor.

(a) Exceeds £1 sterling yearly;
Sec. 12.

Provision is made for allocation of the standard charge upon sale or division of the lands in sec. 13.

On the other hand, where the standard value as above mentioned does not exceed the sum of £1 the heritor or other person liable in payment of the stipend *must* redeem the same at the first term of Whitsunday or Martinmas occurring not less than three months after the roll becomes final. Such redemption may be either (a) for a payment agreed upon between the heritor and the General Trustees; (b) by a payment to the General Trustees of a sum equal to eighteen times the standard value of the stipend; or (c) by payment to them, along with each half-yearly instalment for a period of eighteen years from said term, of a redemption instalment equal to 75 per cent. of the half-yearly payment, this being recoverable in the same manner as the half-yearly payment itself. Upon redemption of the stipend, any claim upon the heritor or other person previously liable in respect thereof shall cease and be extinguished, an entry in the teind roll to that effect being sufficient evidence of the redemption.

or (b) does not exceed £1 yearly.
Sec. 14.

Method of redemption.

Where heritor is due not more than 1s. annually, total relief granted.

Where the standard value of the stipend exigible from *all* the lands of any heritor in a parish (whether these lands are comprised in one or in more than one entry in the teind roll does not exceed the sum of 1s., such heritor is by sec. 15 of the Act relieved from any claim in respect of the stipend (other than a claim for any payment due at the passing of the Act), “which claim shall cease and become extinguished as at the first term of Whitsunday or Martinmas occurring not less than three months after the date at which the teind roll becomes final.”

Competency of obtaining valuations or approvals.

By the 16th section of the Property and Endowments Act the powers hitherto existing, which heritors have had of obtaining valuations of their teinds, and of surrendering valued teinds, and also of having reports of the Sub-Commissioners relating to the valuation of teinds approved, have been much abridged. As from the passing of the Act (but without prejudice to any proceedings taken before that date, or to any proceedings which may be taken within three years thereafter for the approbation of reports of Sub-Commissioners relating to the valuation of teinds), the previously existing law and practice relating to these matters ceased and determined. For these are substituted the provisions set out in the Sixth Schedule of the Act. These will be explained in the proper place. In accordance with them, one-fifth of the annual agricultural value of any land so ascertained shall be the valued teind of these lands in all time coming. But if within the period specified in the Schedule (*i.e.*, within twelve months after the date of the issue of the teind roll for the parish) no application is made by a heritor or titular in respect of teinds which have not been valued, then the value of the teinds specified in the teind roll for the parish in which the lands are situated shall be deemed to be accepted by acquiescence, and shall be deemed to be of these lands in all time coming. As from the date of standardisation of any stipend under the provisions of

Sec. 16 and Sch. 6.
See Appendix, p. 581, *et seq.*

Sec. 16.

the Act, the *heritor* of any lands from the teinds of which the stipend or any part thereof is exigible shall, in accounting in respect of these teinds to the titular thereof, be entitled to deduct the amount of the standardised stipend exigible from these teinds, or of any standard charge coming in place of such stipend or any part thereof; and that whether such stipend or part thereof or standard charge has been redeemed or extinguished. Sec. 17.

To facilitate transaction between titulars and heritors in regard to surplus teinds it is provided by sec. 18 that notwithstanding anything contained in the Act of the Scots Parliament, 1693, c. 23 (an Act renewing the commission for plantation of kirks and valuation of teinds), or in any other enactment or in any charter, grant, or deed, it shall be lawful after the passing of the Act of 1925 for the titular or any other person having right of titularity to sell surplus teinds on such terms as may be agreed upon between him and the heritor.

Increased facilities for transacting regarding surplus teinds.

Nothing in this section is to prejudice or affect the provisions of the Acts of the Scots Parliament, 1633, c. 17 (anent the rate and price of teinds), and 1690, c. 23 (concerning patronages), or any other enactment at present in force authorising the sale of surplus teinds.

Part 3 of the Property and Endowments Act provides for a change in the relation of the *heritors* towards what may for shortness be termed the ecclesiastical buildings of the parish which is as drastic in its way as is the operation of the provisions in regard to the payment of stipend. Hitherto, as we have seen, the *heritors* have been proprietors of the church as trustees for the parishioners, and in this connection have had important rights in regard to the allocation of sittings in the church and important duties in regard to the maintenance of it. Similarly, in regard to manses and glebes, the *heritors* have had the duty of providing these, and in case of the former

Relation of the heritors to the ecclesiastical buildings, &c., of the parish.

a considerable duty of maintenance. By the operation of Part 3 of the Act of 1925 all churches and manse—these being once and for all put by the heritors into a state of reasonable tenantable repair—will thereafter be vested in property in, and belong to, the General Trustees of the Church to the same effect as if held in blench farm of the Crown for a feu of 1d. Scots, if asked only. As the necessary preliminary to the introduction of this new state of things, sec. 27 of the Act provides that, as from and after 1st February, 1925, no proceedings relating to any of the matters mentioned in sec. 3 of the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868, shall be instituted or entertained before or by any Presbytery or in Court of law or before the Commissioners under the Act, except in so far as is thereafter in the Act provided. This restraint on such proceedings is, however, declared to be without prejudice to any proceedings instituted before the dates specified or to the enforcement of any order, &c., made, given, or pronounced therein, or to any contract or agreement made by the *heritors* before that date, or to any resolution passed by *heritors* to levy an assessment to meet expenditure incurred in pursuance of such contract or agreement; and any such assessment shall be recoverable as if the Act had not been passed. The proceedings covered by the reference to the Ecclesiastical Buildings and Glebes Act, 1868, are proceedings relating to the building, rebuilding, repairing, adding to, or alteration of churches or manse, or to the designing or excaing of sites therefor, or to the designing or excaing of sites for or additions to glebe or churchyards and the suitable maintenance thereof (including the building or repairing of churchyard walls).

In a certain number of cases proceedings were depending at the critical date in regard to such matters; and, where this was so, these may be carried through to completion and any order or decrees pronounced in them will require to be implemented. In

Sec. 28 (3) (a).

Initiation of proceedings under Ecclesiastical Buildings, &c., Act, 1868, after 1st February, 1925, prohibited.

31 & 32 Vict. cap. 96.

Saving of repairs, &c., under actions pending or contracts made prior to 1st February, 1925.

other cases, either as the result of previous proceedings completed, or voluntarily, the heritors may have as at first February, 1924, entered into contracts or agreements with regard to the matters in question—either of the nature of a general contract that they would execute certain work—rebuilding or repairs, &c., or of contracts with tradesmen incidental to the carrying out of obligations in regard to these matters either judicially established or accepted voluntarily. In such cases the work falling to be done under decree or arrangement will require to be carried through to completion. And not only will assessments already resolved upon at the said date require to be met, but the *heritors* may resolve at any time even after that date to levy any assessment necessary to meet expenditure incurred in pursuance of such contract or agreement which shall be recoverable as if the Act had not been passed. Sec. 27.

The provisions for having a church and manse put into a reasonable state of tenantable repair will be more appropriately considered in the chapters dealing with these subjects (*infra*, Chaps. IV. and VII.). When these buildings have been put into a state of repair, then any heritor concerned may apply to the Sheriff for a certificate that all obligations incumbent upon the heritors with respect to the church or manse of a parish have been fulfilled. The Sheriff shall deal with the application in a summary manner, and shall issue a certificate to that effect if the General Trustees admit that the subjects are in such condition, or if he himself is satisfied on the matter (see further as to this, *infra*, p. 141). The certificate issued will be in the form of the Eleventh Schedule of the Act, and shall either contain or sufficiently refer to the description of the subjects to which it relates. It is apparently contemplated that a separate certificate shall be given for each church and manse respectively. The certificate may be recorded by the General Trustees or by any *heritor* Provisions for repairs under 1925 Act. Procedure on completion. Sec. 28 (2) and (3). Appendix, p. 598. Sec. 28 (2).

concerned in the appropriate Register of Sasines. When the certificate has been so recorded, any liability or obligation incumbent on any *heritor* in connection with the subjects to which the certificate relates shall be at an end except obligation or liability to assess or to be assessed for the repayment of any debt existing at the date of the certificate; and all rights of property in the said subjects shall by virtue of the Act and without the necessity of any further conveyance vest in and belong to the General Trustees to the effect already mentioned. In certain parishes, town councils, in their capacity as such, or other public bodies (statutory or otherwise), or kirk-sessions or persons had under the former law and practice or by Royal Warrant, charter, judgment, agreement, or custom been liable along with or in place of the heritors in obligations relating to the church or manse. To meet these cases it is provided that the Presbytery or General Trustees, or any other person concerned, may apply to the Sheriff to find and declare that the case ought to be dealt with by the Commissioners under the Act, and if the Sheriff so finds and declares, then the provisions of sec. 28 shall have no further application to the case. But the Commissioners shall, so soon as conveniently may be, inquire into all circumstances relating to existing obligations in respect of the fabric and site of the church or manse and the maintenance of such fabric; and may by order provide for the transfer to the General Trustees of the said fabric and site, and of all powers and duties in respect of the maintenance and repair of the said fabric. (See *infra*, pp. 146, 147.) The Sheriff's determination is final in any such application on the question whether the church or manse to which the application relates is the church or manse of a parish within the meaning of sec. 28.

An important alteration is made in regard to assessments for repairs, &c., on the provisions which were introduced by the Ecclesiastical Assessments Act, 1900,

Sec. 28 (3).

Vesting of
subjects in
General
Trustees.

Where town
councils, &c.,
liable instead
of or along
with heritors,
special pro-
cedure pro-
vided.

Sec. 28 (4).

by sec. 28 (6) of the Property Endowments Act, which provides as follows:—

Assessments
for repairs—
General Trustees to relieve
of assessment
on valuations
under £30 of
real rent.

(6) Whenever in any parish it shall be necessary in consequence of anything done, or agreed, or ordered to be done under or in pursuance of this section to impose any ecclesiastical assessment upon lands and heritages in the parish, and such assessment is imposed according to the real rent thereof, the following provisions shall have effect, in lieu of the provisions of section three of the Ecclesiastical Assessments (Scotland) Act, 1900:—

- (a) No part of such assessment shall be imposed or levied upon lands and heritages occupied solely as the church and accessory buildings or burying-ground attached of any religious body, or as the dwelling-house with offices or garden or glebe land attached of the minister of such church;
- (b) The rental on which each heritor shall be assessed shall be his total rental within the parish as appearing in the valuation roll (whether such rental consists of one or more subjects), but subject to deduction of the sum of THIRTY pounds;
- (c) The amount of the deficiency created in the total amount of the assessment, by allowing the said deduction of thirty pounds to every heritor, shall be defrayed by the General Trustees;
- (d) No heritor, who by reason of any exemption or deduction allowed by this sub-section is relieved altogether from assessment in respect of the execution of any repair, or in respect of any payment by the heritors in lieu of repair, shall be entitled at any meeting of the heritors to take part in the discussion of, or to vote upon, any question concerning any plans for or the execution

of the said repair, or the defraying of the expenses of the same, or any question concerning an agreement involving payment by the heritors in lieu of repair.

These provisions, it will be observed, follow the general lines of those contained in the Act of 1900, in place of which they come. But whereas in that Act the relief in assessment was dependent on the amount of the deficiency which would thereby be created being paid to the collector by the kirk-session, the relief is now made automatic wherever the assessment is imposed according to real rent, the General Trustees being made responsible for the amount of the deficiency so caused.

Possibility of arrangements between heritors and General Trustees in order to avoid expence of preparing special roll.

In the case of many parishes in towns and populous places it may happen that in order to assess on the real rent it would be necessary to incur serious expense in the preparation of a roll in order to effectuate this; and the valued-rent heritors may find it to their interest to forego such assessment if they can do so without losing the benefit of the relief afforded by the contribution which would be got from the General Trustees. In such cases there seems to be no good reason why an arrangement should not be come to between the heritors and the Trustees whereby, upon provision by the heritors of the amount which would have resulted from an assessment on real rent under deduction of £30 from the rent of each heritor's subjects in the parish as appearing in the valuation roll, the General Trustees will accept this and agree to provide the balance which would be exigible from them under the scheme of the section. The valuation roll will afford the data needed to arrive at this without the necessity for preparing a roll allocating the assessment among the individual real-rent heritors, as would be the case if the amount payable from the heritors were to be raised by actual assessment on the real rent. (See sec. 28 (6) (b).) The power given to the Sheriff (sec. 28 (2)) to issue the certificate if the General Trustees "state or admit" that the obligations incumbent

on heritors have been fulfilled, along with the general power to Trustees under sec. 37, subject to the provisions of the Act and the directions of the General Assembly "to compromise or settle any claim against or by any heritor or other person arising out of anything contained in this Act or done thereunder," gives scope for the necessary elasticity in making such arrangements.

Under sec. 28 (8), subject to the modifications incidental to these provisions in regard to assessment and to the exclusion from voting of heritors who are altogether relieved by these, the existing law and practice relating to heritors' meetings and ecclesiastical assessments shall apply to meetings of heritors to be held and assessments to be imposed under or in consequence or in pursuance of the provisions which have been dealt with.

Former law as to meetings continues generally operative.

As a corollary to the transfer of the property in the churches to the General Trustees, and the relief of the heritors from future responsibility for the maintenance of them, the right of allocation of the sittings in the church hitherto enjoyed by the heritors has been abrogated, it being provided that "on the expiry of one year from the date on which any church is by or in pursuance of this Act transferred to the General Trustees the right of allocating sitting accommodation in the church, whether with or without payment therefor, and the right of disposal of any proceeds therefrom shall belong to the kirk-session, or to such other body as the General Assembly may direct, and any existing right to such accommodation shall cease and terminate." Moreover, by the repeal, by sec. 46 and Sch. 12, of the latter part of sec. 54 of the Poor Law Act, 1845, any right which heritors may have hitherto had of examination of the accounts of expenditure of church-door collections or inquiry into the application of these will disappear.

Transfer of rights in regard to seats to kirk-sessions.

Sec. 29.

In view of the provisions of sec. 29, heritors will no longer be entitled to claim as of right the occupation or enjoyment of the areas

heretofore allocated to them as sitting accommodation for themselves and their tenants. But it is reasonable to expect that the kirk-session, or other body to which the General Assembly may entrust the right of allocating sitting accommodation in a church, will, where sittings have been properly made use of by those at present entitled to them, pay suitable regard in their letting of seats to the existing state of possession, so far as this can be done with due regard to other demands upon the accommodation available. It is understood that there are instances in which a large heritor has by arrangement with the Presbytery at the time of building a church, or subsequently, erected at his own expense a portion of the church area, on the footing that it should be available to him for a family pew or loft, and in some cases for the accommodation of his dependents. Whether such areas can be held to fall within the operation of the provision for transfer of the right of allocating sitting accommodation to the kirk-session or other body will probably be found to depend on the circumstances of the particular case. Where the portion in question forms part of the area which would have normally been subject to allocation apart from the arrangement (and this is likely to be the usual case), it would seem to fall under the Act. But here, again, considerations of courtesy and good sense will doubtless result in an adjustment which will give reasonable effect to the existing state of enjoyment. Sec. 29, like the rest of this part (Part III.) of the Act, in which it occurs applies only to *quoad omnia* parishes (sec. 26), and that with certain exceptions specified in sec. 26.

Application
to family
lofts or pews.

Manse maill
redemption.
Act, sec. 40
(1).

Where in any parish manse maill was at the passing of the Act payable in lieu of a manse, provision is made for redemption of this. In such a case the heritors legally liable in payment of such manse maill shall redeem the manse maill by payment to the General Trustees of a sum equal to the annual amount thereof multiplied by twenty, such redemption pay-

ment to be made within five years after the passing of this Act. Under the terms of sec. 40 (1) the basis of the redemption payment appears to be fixed by the sum payable at the date of the passing of the Act.

Where a manse has been sold and the price invested and the income from the investments representing the price paid to the minister, those investments shall within five years after the passing of the Act be transferred to the General Trustees, and on the completion of the transfer any liability of the heritors in respect thereof shall cease. Transfer of investments representing price of manse sold.
Act, sec. 40 (2).

In the provisions relating to glebes (dealt with in Chap. VIII., *infra*), the duty is thrown upon the clerk of every Presbytery within one year after the passing of the Act to furnish a list of the glebes appropriated to the ministers of the parishes in his Presbytery, with certain other particulars; and at the same time he is directed to intimate in which cases, if any, it is claimed by the Presbytery (whether on the representation of the minister concerned or otherwise) that the *heritors* concerned have not fully implemented the obligations incumbent on them according to the present law and practice with respect to the provision and enlargement of a glebe. The Ecclesiastical Commissioners are directed to inquire into all the circumstances, and thereafter to make orders relating to the glebes, &c. Every such order shall make provision for, Glebes.
Sec. 30 (1). *inter alia*, the implement by the *heritors* of any obligations incumbent on them as aforesaid which have not already been implemented; and the conversion into a Sec. 30 (2).
Sec. 30 (3) (a).
Sec. (3) (f). money payment of any right of pasturage over any lands which is possessed by the minister as minister of the parish, and the redemption of that money payment, if the heritor or heritors concerned so desire, in such manner as may be agreed upon between the General Trustees and such heritor or heritors, or as, failing agreement, may be fixed by the Commissioners.

Churchyards transferred from heritor to parish councils.

The Act contains provision for the transfer as at and from the date of its passing of any churchyard theretofore held by the *heritors*, by virtue of the Act and without the necessity of any further conveyance from the heritors, and for the vesting thereof in the parish council to the same effect as if the churchyard had been as at that date transferred by the heritors to the council in pursuance of sub-sec. (6) of sec. 30 of the Local Government (Scotland) Act, 1894. It will be observed that this transfer differs from those hitherto considered in that it took place automatically by virtue of the Act as at the passing of the Act (28th May, 1925).

Sec. 32.

57 & 58 Vict.
c. 38.

The results following on this transfer will be found set out in Chap. VI., *infra*, pp. 247 *et seq.*

Obligations of relief in favour of heritors saved.

It is declared that nothing in the Act shall prejudice or affect any obligation to relieve *the heritor* of any lands from liability in respect of any stipend or augmentation thereof exigible from the teinds of such lands, and any such obligation shall extend to relief from liability in respect of any standard charge over those lands or in respect of any payments under the section of this Act relating to provisions where stipend exceeds one shilling but does not exceed one pound.

Sec. 45.

17 & 18 Vict.
c. 80.

The right conferred on heritors by sec. 13 of the Registration of Births, &c., Act, 1854, of appointing in certain circumstances a registrar (subject to approbation of the Sheriff) disappears owing to the repeal of that section by sec. 48 and Sch. 12 of the Act of 1925.

Provision for preservation of heritors' records.

Finally, in sec. 44, we find a *memento mori*, recognising that the day of the *heritor* as a factor in the parochial ecclesiastical life of Scotland will soon be a thing of the past, and that it is meet that provision should be made in the public interest for preservation of the books, records, and documents of the heritors when they shall have ceased to function. To this end it is enacted that "Whereas in consequence of the

transfers of rights of property and the transfer or termination of obligations in connection therewith effected or to be effected by or under or in pursuance of this Act, the powers and duties of heritors (including the power and duty to impose and levy heritors' assessments) will in due course be extinguished, it shall be the duty of the clerk to the heritors of any parish where such extinction has been effected to make intimation thereof in writing to the Secretary for Scotland, who may by order under his hand give such direction as he may think necessary or proper with respect to the preservation and permanent custody of the books of the heritors or any records or documents in their possession as heritors or in possession of their clerk." In the Appendix (p. 618) will be found the text of a letter to heritors' clerks issued from the Scottish Office, seeking certain information to aid him in carrying the provisions of this section into effect.

Another instance of "the end of an auld sang!"

A tabular statement summarising the various rights and duties conferred or imposed on heritors under the Act of 1925 will be found in the Appendix, pp. 614 *et seq.*

CHAPTER III.

THE HERITORS' CLERK: HIS STATUS AND DUTIES.

History of
office.

IT is only of recent years that the heritors of a parish have been accustomed to have a permanent official known as a clerk, who keeps the minutes of their body and attends to any correspondence connected with the affairs of the heritors as a *quasi*-corporation. There is no reference to a heritors' clerk in the cases reported in Morison's Dictionary or in Pardovan's Collections. But it is obvious that, when a meeting of heritors is held, a clerk should be appointed, and when at the time there is a person holding the office of clerk to the heritors he will naturally act as clerk to the meeting. If he should not be present any other person may be appointed, and the oath *de fide* should be administered.

29 & 30 Vict.
c. 71.

The Glebe Lands (Scotland) Act, 1866, provided that when a minister, with consent and approval of the heritors and the Presbytery, granted leases of his glebe, "such consent and approval of the heritors and the Presbytery shall be signified by a certificate written on the lease or leases, and signed by the *clerk to the heritors* and by the moderator and clerk of such Presbytery" (sec. 3). When under this Act the minister called a meeting of heritors to consider an application by him to the Court for authority to feu his glebe, then, if the application was approved of by two-thirds in value of the heritors, the direction applied that "the clerk to the heritors shall grant a certificate to that effect under his hand to the minister" (sec. 8). When the minister granted to his feuars any legal deeds, the consent of the heritors thereto fell to be "certified

by the clerk to the heritors and by the moderator and clerk of the Presbytery" (sec. 20). The draughtsman of the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868, seems to have been uncertain as to whether heritors' clerks existed, although the Act of 1866 referred to them. It is true that sec. 3 (now superseded by sec. 28 (6) of the Act of 1925) provided for "the clerk of the heritors, by the authority of the heritors," sisting himself as a party to an appeal under certain circumstances; but sec. 5, which relates to the proceedings in such appeals, dubiously sets forth that the appellant is to intimate his appeal, *inter alia*, "to the clerk of the heritors, if there be such clerk." Yet sec. 22 provides that the heritors' clerk may, on his own initiative, require the minister to call a meeting of heritors.

31 & 32 Vict.
c. 96.

Under the Local Taxation Returns (Scotland) Act, 1881 (44 & 45 Vict. c. 6 (sec. 2)), the clerk was bound to make once a year a return of the heritors' receipts and expenditure under a penalty of £20 (sec. 3). If there were no clerk, the return fell to be made by the person keeping the accounts.

At the present day, in most parishes, the heritors do have a regularly appointed clerk. Sometimes he is a local schoolmaster, but it is much better that he should be a lawyer. His main business has indeed been to attend the meeting of heritors, and to record in faithful and full minutes the business done at such meetings. Incidentally, however, any such clerk must necessarily frequently be called upon to advise the chairman on points of order and law. To the fact that the clerk was often unable to put before a meeting an authoritative statement of the duties and responsibilities of heritors must be attributed many of the misunderstandings which have unfortunately afflicted rural parishes.

Under the Ecclesiastical Assessments (Scotland) Act, 1900, the clerk to the heritors has defined duties, and also duties which are not precisely defined. In any

Duties under
63 & 64 Vict.
c. 20.

parish where, according to use and wont, assessments fall to be imposed on the valued rent, it is to the clerk to the heritors that the request to summon a meeting of valued-rent heritors is to be addressed. The request, it may be assumed, need not be in writing, if the clerk is personally aware that the person who asks him to call the meeting is in truth a valued-rent heritor. The Act provides that such heritor may "request the clerk to the heritors to summon a meeting of valued-rent heritors in the manner prescribed by section twenty-two of the Ecclesiastical Buildings and Glebes (Scotland) Act."

15 & 16 Geo.
V. c. 33,
sec. 28 (7).

As noticed in the preceding chapter (*supra*, p. 58) the Property and Endowments Act, 1925, provides a method for summoning meetings requiring to be called for the purposes of sec. 28 of that Act. There the direction is merely that a "a circular letter containing an intimation of the meeting shall be sent," &c. Nothing is said as to who is to send it. But presumably, as the Act of 1900 is not repealed, its provisions will apply *mutatis mutandis*, including the incorporated provision of sec. 2 of the Ecclesiastical Buildings and Glebes Act, 1868.

But it may be observed that, under the Act of 1868, the clerk has no power to summon a meeting of heritors, though he may cause the minister to call such a meeting on his requisition. It is not likely to have been intended that the clerk should supersede the minister as the person to convene such a meeting, and it is therefore to be understood that a meeting under the Acts of 1900 and 1925 is to be called by the minister in the usual way; a valued-rent heritor, however, should first require the clerk to call the meeting, and the clerk should call upon the minister to do so.

Clerk's duties
in regard to
the roll.

Upon the importance which these Acts throw upon the accuracy of the roll of valued rent of the parish, observations have been offered above. It is upon the clerk that large responsibilities are likely to devolve as to the accuracy of the roll, and what pro-

portion of valued rent constitutes two-thirds of the valued rent of the parish. In the case of *Durie's Trustees v. Ayton* (Dunfermline), 1894, 22 R. 35—where (as mentioned, *supra*, p. 86) certain parties denied liability for heritors' assessments, because among other reasons they had no notice of their liability—Lord Wellwood observed: “No doubt the reason why they were not cited was because the valued rent had not been split up, and their names had not been entered in the cess books or *the books of the clerk to the Heritors of Dunfermline.*”

When it has been resolved to impose an assessment according to the real rent, it will presumably be the clerk to the heritors who will make intimation under sec. 2 of the Act of 1900 to the Presbytery of the bounds and the kirk-session of such parish, although no doubt the heritors may direct any one they choose to make such intimation. It is at all events the duty of the clerk to intimate by circular letter to each heritor—(1) the amount proposed to be levied on him, and (2) the place where and the period for which the scheme of assessment will be open to inspection.

In addition to his duties as clerk, the heritors' clerk is frequently appointed collector of assessments, and this is often a convenient arrangement. Under sec. 3 of the Ecclesiastical Assessments (Scotland) Act, 1900, the collector of an assessment on the real rent received from the kirk-session the amount of the deficiency created in the total amount of the assessment by allowing the deduction of £50 from each rental, where the option conferred by the Act of providing this was taken advantage of by a kirk-session; and on receipt of this the appropriate deduction was made from the assessment of each heritor's rental. Under sec. 28 (6) of the Act of 1925 the corresponding deduction of £30 is automatic, and, as the deficiency in the assessment caused by the deduction falls upon

Intimation
by clerk of
resolution
to impose
real-rent
assessment.

Clerk often
also collector
of assess-
ments.

the General Trustees, it is unnecessary that it should be received by the clerk to the heritors.

Title to sue
for heritors.

It has been questioned whether a heritors' clerk or collector is entitled to sue in the heritors' name, but, as a rule, a heritors' clerk is instructed by minute to take action on their behalf, and when he holds such a minute there seems to be no good reason for disputing his right to sue in their name.

In *Heritors of Bathgate v. Russell*, (O.H.) 1908, 16 S.L.T. 646, it was held that a note of suspension and interdict against encroachment upon a churchyard was properly brought up at the instance of "the heritors" of the parish, "and A. B., clerk to and as representing said heritors." And in the Sheriff Court case of *Malcolm v. Mackay* (Nairn), 21 Sh.Ct.Rep. 55, it was held that the collector's general mandate to collect heritors' assessments was sufficient title to sue for and recover the same.

Where the two classes of valued-rent and real-rent heritors are separately assessable in a parish there may be separate clerks for each, though such a duplication of offices seems undesirable, and would lead to confusion as to which clerk should grant certificates under the Glebe Lands Act.

II. EFFECT OF THE PROPERTY AND ENDOWMENTS ACT, 1925.

Such incidental modification as has been made by the Act of 1925 on the duties of the clerk to the heritors have been incorporated in the text. The only provision of the Act which specifically applies to him is that in sec. 44, which, in view of the extinction in due course of the powers and duties of heritors, enacts that whereas in consequence of the transfers of rights of property and the transfer or termination of obligations in connection therewith effected or to be effected by or under or in pursuance of this Act, the powers and duties of heritors (including the power

and duty to impose and levy heritors' assessments) will in due course be extinguished, it shall be the duty of the clerk to the heritors of any parish where such extinction has been effected to make intimation thereof in writing to the Secretary for Scotland, who may by order under his hand give such direction as he may think necessary or proper with respect to the preservation and permanent custody of the books of the heritors or any records or documents in their possession as heritors or in the possession of their clerk.

The duty of making this intimation will arise "where such extinction has been effected." This situation will arise when (a) the certificates provided for under sec. 28 (3) in respect to buildings have been duly recorded; (b) the glebes have been transferred, any obligations affecting heritors implemented, and any burdens, &c., in respect of the glebes discharged as provided in the schemes of the Ecclesiastical Commissioners under sec. 30; and (c) any obligations in respect of manse maill under sec. 40 duly implemented.

A letter has been issued from the Scottish Office to the clerks to the heritors of the various parishes in Scotland, asking them to furnish certain information calculated to facilitate the carrying out of the provisions of sec. 44. A copy of this is printed in the Appendix (*infra*, p. 618).

REMUNERATION OF HERITORS' CLERKS.

The following points may be noted as embodying the result of some experience in this:—

1. As a rule in rural parishes the clerk was the local schoolmaster, who was frequently also the kirk-session clerk.

It was unusual to have more than one meeting of heritors annually, and sometimes meetings were not held for a number of years.

The clerk did not, as a rule, receive a salary;

when given, it was of nominal amount, except perhaps in large parishes.

2. Where the heritors' clerk was appointed collector of assessments, he received a percentage on the sum collected, and this paid him very well.

3. The clerk should keep (1) heritors' minute book, and (2) record of interments authorised by the heritors, through him. But it is impossible to say that either the minute book or record of interments was invariably well kept. The record of valued-rent heritors was in practice the assessment book, wherein the *Collector* recorded the assessments (a) imposed, (b) paid.

4. The collector was not invariably the heritors' clerk.

PART II.

CHAPTER IV.

CHURCH.

“CHURCH, a parochial building devoted to the service of God and the celebration of the rites of religion : the place of Divine worship of the inhabitants of a parish. Middle English *chirche*, *chireche*, Anglo-Saxon *cyrice*, *cirice*, later *circe* (whence English *kirk*), from Greek *κυριακόν*, a church, neut. of *κυριακός*, belonging to the Lord—from Greek *κύριος*, a lord, orig. mighty. The Icelandic *kirkja*, German *kirche*, &c., are borrowed from the Anglo-Saxon.”

—SKEAT.

THE duty of providing and maintaining THE PARISH CHURCH in each parish of Scotland is one which has hitherto been laid by law upon the heritors of the parish.

Common law duty of providing and maintaining parish church.

Historically, indeed, in pre-Reformation times, the burden of maintenance fell upon the person enjoying the church benefice. This might or might not be the holder of the cure, according as he was or was not in right of the benefice. A curate, for example, had no such obligation laid on him. If the share of the benefice laid aside for church purposes was inadequate, the parishioners were also required to contribute.¹

Historical origin and development of obligation.

By Act of 13th September, 1563 (made under authority conferred by Act of Parliament passed in June previous—1563, c. 12 [76]—which was the foundation of the modern law for the repairing of

¹ Among the canons enacted by provincial councils in Scotland between 1237 and 1286 is one directing that the churches be built of stone—the nave by the parishioners, and the chancel by the rector. The diocesan synod of St. Andrews, which met at Musselburgh in 1242, directed that the chancel of a church should be kept in repair by the rector, the rest of the church by the parishioners.

kirks and kirkyards),² the Lords of Secret Council ordained that parish churches should be maintained by the parishioners and the minister ("the parochianaris and persone"), two-thirds of the cost being paid by the former, who were to assess themselves "for furnessing of the twa part of the expenssis to be maid in bigging and repairing of the saidis parochie kirkis." The parson's share was to be secured by the officers of the Queen's Sheriffs sequestrating the fruits, teinds, and profits of the parish so far as might extend to the parson's share.

1572, c. 15
[54].

In 1572 the third Parliament of James VI. passed an Act³ "anent the reparation of the Paroche Kirkis," which states that the Act of the Secret Council "as yet hes not tane execution in na place, because of the sleuth and unwillingnes of the parochiners," who refused to choose persons to tax their neighbours. The Act provides that when the parishioners failed to see to their church, the archbishop, bishop superintendent, or commissioner of the kirks was authorised to interfere, and to appoint persons in every parish for making and settling the taxation, "as alswa for receiving the samin." Any parishioners whose kirk had been destroyed were entitled to complain to the archbishop or bishop, superintendent or commissioner, who was to take "just tryal in the said matter."

The question of relative liability seems to have been settled by a compromise. The parish minister or person in right of the teinds repaired the choir, and the heritors the rest of the kirk. If there was no choir, the practice was to require the minister to pay one-third of the cost of the repairs on the church (*Shaw v. Countess of Winton*, 1623, Mor. 7913).

In the case of *Selkirk*, 1628, the choir was "not distinctly known from the body of the kirk." The

² See Alexander's Abridgement of the Scots Acts, p. 41. In this and other references to the Abridgement the chapters are as given there and in Thomson's folio Acts. References to the chapters as given in Glendook's small three-volume edition are, in the case of the more important Acts, stated in square brackets, [].

³ See *ibid.*, p. 49.

Court held "the third part of the sum imposed [by the heritors for repair of the CHURCH] ought to be paid by the parson or his tacksman who meddles with the parsonage teinds, seeing commonly the QUIER (choir) is to be reputed the third part of the kirk; but if the quier be distinctly known from the rest of the kirk it may seem to be reasonable that if the parson, or his tacksman will uphold the quier, that they ought to pay no part of the sum imposed" (*The Kirk of Selkirk v. Stuart*, 1628, Mor. 7913. See also *Relict of Minister of Ednam v. Laird of Wedderburn*, 1663, Mor. 8499).

If the ministers of Scotland were successors in any legal order to the "parsones" or parsons of their parishes two hundred years ago, they might still be liable for the maintenance of one-third of the parish church. But they are not. By the Acts 1690⁴ and 1693⁵ 1690, c. 7 [5]. 1693, c. 38. the non-Presbyterian clergymen at those dates in charge of their respective parishes were removed, and the teinds transferred to the titulars of the teinds. But with the teinds was taken no burden to share the cost of maintaining the church as the parson had done. The succeeding clergymen were not parsons, and participated neither in their liability nor in their teinds; and the whole liability for the erection or maintenance of parish churches fell on the parochiners or heritors. An attempt was made in 1738 to make out (*Heritors of Selkirk v. Duke of Roxburgh*, 1738, Mor. 7915) that the titular of the teinds came in place of the parson, and was liable to maintain the third part of the kirk. The defence was, generally, that there was no law which made a titular liable. "Indeed, where there is a quire," it was pled, "it hath been found the parson is bound to repair it; and perhaps, on the same foundation, where there is another titular of the teinds than the parson, he hath been found liable; but where there is no quire, as is the case here, there

Obligation is on heritors, and is not shared by titulars as such.

⁴ Alexander's Abridgement, p. 365.

⁵ *Ibid.*, p. 376.

is no instance known of either the one or the other's being obliged to repair the kirk." The Court found the titular not liable (except of consent as upon his valuation), and the point does not appear to have been again raised.

Extent of obligation defined by what necessary for reverent and orderly meeting for congregation for worship.

Heritors were bound to 'maintain A PARISH CHURCH in such a state as should admit of the reverent and orderly meeting of the congregation for the worship of God and the celebration of the rites of religion sanctioned by the Church of Scotland. If they did not do so they could be made, on application to the Presbytery, to undertake the necessary work (*Minister v. Heritors of Dunning*, 1807, Mor., Kirk, Appendix 4). The Presbytery came to exercise a similar authority in this matter to that formerly pertaining to the archbishop, bishop superintending, or commissioner of kirks, under the Act of 1572.

Must parish church be within parish boundaries?

It may be taken as normally an essential rule that the parish church should be within the parish. Yet in exceptional circumstances the parish church has been outside the parish boundary. Thus in the case of the Old Church Parish of Edinburgh, Lord President Inglis said: "The church of the parish, at least for a good many years, has been a portion of the ancient cathedral church of St. Giles, but it is not situated within the parish of which it is the church, but at some distance from it. Notwithstanding, it was undoubtedly recognised and known as one of the parish churches of Edinburgh, and legally constituted as such" (*Murray v. Magistrates of Edinburgh*, 1874, 1 R. 482, at 484).

DISREPAIR.

Disrepair: liability for repair.

The question, when is a church in a state of disrepair? was not always an easy one for heritors to solve. Its solution often gave rise to acute differences of opinion. It is a question which for heritors of to-day has special and immediate interest, in view of the obligations laid on them under

the Property and Endowments Act. (See *infra*, pp. 138, &c.) The usual and safe course was for the heritors to get a report from a man of skill, asking him to state any circumstances pointing to risk of accident or danger to health. If on the report the church was found to be in disrepair, a second and more difficult question had formerly next to be faced. For it was a settled rule of practice that if the cost of repair would in the long run be much more expensive to the heritors than the cost of building a new church, then the CHURCH should be rebuilt. Every case fell to be decided on its own merits, the test being the provision of "a safe and serviceable church" (*Murray v. Presbytery of Glasgow* (Kirkintilloch), 1833, 12 S. 191). As an alternative expression of what could be exacted, "sufficient and serviceable" has been suggested as more appropriate. (Now, under sec. 28 of the Property and Endowments Act, the measure of the obligation is that the church be put into "a reasonable state of tenantable repair.") It was the rule that if the church were in a "repairable" condition, the heritors must repair it. (See *Cunninghame v. Deans* (Stewarton), Dec. 12, 1811, F.C.; *Gordon v. Gordon* (Kincardine O'Neil), 1846, 18 Jur. 595; *M'Leod v. Carment* (Rosskeen), 1830, 8 S. 475; *Earl of Glasgow v. Miller* (Neilston), 1831, 9 S. 370; affirmed 1834, 7 W. & S. 185.) It is conceived that this rule still applies under the recent Act—unless, indeed, the General Trustees agree with the heritors, under sec. 28 (1), to accept payment of a sum of money in lieu of repairs.

Repair or
rebuilding?

15 & 16 Geo.
V. c. 33.

The heritors could not be called upon to ENLARGE a church merely because of its inadequacy in size. Not only so, but they could not legally resolve to do this, even by a majority (*Lynedoch v. Smythe* (Methven), 1828, 6 S. 791; *Earl of Glasgow v. Miller* (Neilston), *supra*). To throw the burden of enlarging the church on the heritors, a state of disrepair involving substantial and extensive repairs had to be admitted. The two conditions of inadequacy

No obligation to enlarge a church except as incidental to dealing with dis-repair.

and disrepair must go together. The heritors must consider if it would not be less expensive to rebuild the church. It does not appear that the heritors could have been called on to enlarge as well as repair a church, if the purpose were to give accommodation to other than permanent dwellers in the parish, or if the inadequacy were trifling. As to state of disrepair warranting enlarging, see *Lerwick* case, Jan. 27, 1820; Connell, Parishes, Suppl., 44-53, 125-30.

Rebuilding.

When a church was in an "unrepairable condition," i.e., was either absolutely past repair, or it appeared probable that repairing it would in the long run be more expensive than or nearly as expensive as rebuilding, it required to be rebuilt. There must be no doubt about the necessity of the case; the heritors fell to be guided by the opinion of a man of skill, to whom a remit had been made at a meeting specially convened. If the cost of repairing the church would be about three-fourths of the cost of building a new church of similar size, the church must be rebuilt (*M'Leod v. Carment* (Rosskeen), 1830, *supra*; *Bertram v. Presbytery of Lanark* (Carnwath), 1864, 2 M. 1406).

Position
under
Ecclesiastical
Buildings
and Glebes
Act, 1868.

After the passing of the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868, the repair or rebuilding of churches became in case of dispute a matter for the decision of the Sheriff, with a right of appeal (rarely exercised) to the Lord Ordinary on Teinds. Unfortunately the decisions in the Sheriff Courts were not always fully reported. The case of *Shettleston*, however, which occurred shortly before the publication of the last edition, and all the papers in which were made available to the author of that edition, affords valuable information as to the judicial view then taken of the points necessary to be considered in regard to the repair or rebuilding of a church. *Shettleston* Church was built in 1671. The Presbytery of Glasgow, in February, 1896, pronounced a deliverance finding that the church was in a ruinous and dangerous condition, and unsafe for the attend-

Shettleston
case.

ance of the parishioners on Divine service, and that it was incapable of being repaired so as to render it safe and suitable without incurring a cost practically equal to the cost of erecting a new church, and they decerned the heritors to take the church down and rebuild it. On appeal to the Sheriff Court of Lanarkshire, Sheriff Strachan, Sheriff-Substitute, found that, "in accordance with the law as presently existing, it is not expedient to repair the Parish Church of Shettleston, and that a new edifice must be erected." In his note the Sheriff-Substitute learnedly discussed the *criteria* which had been established for deciding whether repair or rebuilding was appropriate.

As the repairs which, under the Property and Endowments Act, 1925, can be required are limited to repairs "not involving structural alterations," the question of rebuilding can now be of practical concern only (if at all) in the improbable case of a church in regard to which proceedings were initiated prior to 1st February, 1925. (See sec. 27 of the Property and Endowments Act.) So that the formerly prevailing law on the matter is now of merely academic interest. It is therefore unnecessary here to do more than refer to the portions of Sheriff Strachan's note dealing with this aspect—which were fully cited on pp. 66 and 67 of the last edition of this work. For the same reason any full examination of the other cases dealing with rebuilding would be out of place. Reference may be made to the most recent, and what will probably be the last case under the former law, that of *Gordon v. Cathcart Parish Real-Rent Heritors*, 1925 S.L.T. 125.

But, keeping this in view, the observations of the Sheriff in the *Shettleston* case on the meaning to be attached to "repairs" may still be useful as throwing some light on the question of what is a "reasonable state of tenantable repair" (as applied to buildings to be used for the reverent and orderly meeting of a congregation for public worship according to the

Effect of
Property and
Endowments
Act, 1925,
on repairs
demandable.

What is
"reasonable
state of
tenantable
repairs?"
Indications
from
decisions in
former law.

usages of the Church of Scotland), this being the standard by which the obligations of heritors fall to be measured in applying the provisions of the Act of 1925 (cf. *Dunning case*, *supra*, p. 126). On this matter Sheriff Strachan observed—

“ The second point to be determined is the meaning to be attached to the word ‘ repairs ’ when used in connection with the question. Now, I think it clear that it is not to be understood in the narrow or restricted sense of merely mending, refitting, or restoring to a good or sound state something which has become decayed, or been destroyed or injured. . . .

“ The third point is this: what is the criterion or standard by which the sufficiency of the repairs is to be determined? The heritors’ contention on this question is that their duty is discharged if they put the church in as good a condition as it was at the time of its erection in 1751. The case, they say, is entirely different from that of a rich city congregation. The members of that congregation are spending their own money, and can do with it what they please, while the heritors, being burdened with the cost of a church which the great majority of them do not attend, and in which they have no interest, are bound to do nothing more than provide a building in which the congregation can worship without any risk of injury to their health. In fact, they regard their obligation very much in the same light as the obligation to make provision for the poor, which is considered to be discharged by supplying them with the plainest food and the cheapest clothing. This is, in my opinion, an entirely mistaken view on their part. There are, unquestionably, very great differences of opinion as to the justice or expediency of providing a church for a particular congregation at the expense of the owners of property in the parish; but there can be no doubt that, so long as that is the law of the country, it must be administered in a fair, reasonable, and equitable manner. What the law requires on the part of the heritors is that they pro-

vide and maintain in the parish 'A SUITABLE AND COMFORTABLE PLACE OF WORSHIP.' There can, of course, be no formal standard by which the sufficiency of these equipments can be tested, that must be left to the Court to determine in each particular case. I do not think that I should go far astray were I to hold that the standard in the present case may be taken to be the condition into which a modern congregation, possessing the requisite means, would desire to put their own church."

Whatever course the heritors agreed to follow—to repair and enlarge or to rebuild—the resolution had to be come to at a special meeting, duly called for the consideration of the subject. Estimates had to be obtained and approved before the work was proceeded with. The preses of a meeting of heritors was in use to be authorised to sign the acceptance of estimates approved by the meeting. Procedure adopted.

It was not necessary, when the heritors acted of their own accord (*i.e.*, without an order from the Presbytery), that any of the plans should be submitted to the Presbytery. The matter was entirely one for the heritors themselves. The only province of the Presbytery was to see that the church was of proper size for accommodating those who attended public worship (*Minister v. Heritors of Tingwall*, 1787, Mor. 7928). "With the nature of the structure of the church to be built, the Presbytery," said Lord Alloway in the *Barra* case, "had nothing to do if proper accommodation is provided" (*M'Neill v. Nicholson*, 1826, 6 S. 422, at 425).

It was, however, not unusual to submit the plans to the Presbytery for their approval.

It occasionally happened, especially in a burghal-landward congregation, that the parishioners, where the church was not in a state of actual disrepair, desired that a more suitable or ornate building should be erected, and offered to erect a new church if the heritors would accept it in place of the old. In this case the plans were usually submitted for the appro- Procedure when parties other than heritors took part in erecting new church.

bation of the Presbytery, and the heritors when giving their consent properly stipulated—(1) that the plans as approved by the Presbytery and themselves, or by themselves alone (if the Presbytery had not been consulted), should be strictly followed; and (2) that the amount required to provide for the completion of the work shall be deposited in bank in joint names of, say, two members of the congregational committee and two members of the heritors' committee. Sometimes the heritors agreed to accept the deposit of satisfactory letters of guarantee for amounts which the heritors themselves were only to receive on the completion of the work.

Capacity of church—two-thirds of "examinable persons."

A church, when enlarged or rebuilt at the expense of the heritors, ought to be capable of containing two-thirds of the "examinable persons"—i.e., parishioners not under twelve years of age (*Minister v. Heritors of Tingwall*; *Lynedoch v. Smythe* (Methven); *M'Leod v. Carment* (Rosskeen), all cited *supra*). Two-thirds of the parishioners was assumed to be the probable number of hearers. Two exceptional cases were *M'Neill v. Nicholson* (Barra), *supra*, and *Hamilton v. Presbytery of Hamilton* (Bothwell), 1827, 6 S. 47, in which the circumstances of the parishes were admitted to be special. (See also later stages of the last-mentioned case, reported as *Campbell v. Jack* (Bothwell), 1829, 8 S. 196; 1830 and 1831, 9 S. 167, 796.)

Site of new church.

The new church ought to be erected upon the site of the old church, or as near it as possible. The heritors had no discretion in the matter (*Gordon v. Gordon* (Kincardine-O'Neil), 1846, 18 Jur. 595). The materials of the old church might be used in the construction of the new church—the congregation meantime worshipping in any convenient place of meeting; or the materials might be sold and the price applied to the cost of the new church. Sometimes, however, it was found that the site of the old church was quite inadequate for the erection of a new church. In the case of *Shettleston* (*supra*), the Sheriff

found that the new church to be erected must be capable of affording accommodation for at least 1200 people, while the old church had provided inadequate accommodation for 800 people; and he remitted to an architect to examine and report “on the suitability of the present site of the church as a site for a new church of the aforesaid capacity, and also to examine and report on any other ground in the neighbourhood which, in his opinion, is suitable and convenient for the site of the new church, the said reporter to hear parties with reference to the matter hereby remitted, and to report *quam primum*.” Ultimately a new site was found necessary by the Sheriff.

When a new church has been taken possession of by the minister, with the sanction of the Presbytery, this invests the building with the character of the parish church, and divests the old building of its parochial character (*Lynedoch v. Smythe* (Methven), *supra*; *Duke of Richmond v. Earl of Fife's Trustees* (Urquhart), 1844, 6 D. 701). But if situated within the churchyard, the majority of the heritors may be restrained from permitting it to be used for worship by a congregation not belonging to the Church of Scotland (*Urquhart* case cited): or from alienating it under circumstances indicating the probability of such use. (Cf. *Wright v. Lady Elphinstone* (Tulliallan), 1881, 8 R. 1025, and *Russell v. Marquess of Bute* (Rothesay), 1882, 10 R. 302.) The property of the church has hitherto been in the heritors. Property of church hitherto in heritors; It has been held that a parish church, or a building which formerly was the parish church, cannot, at least where within the churchyard, be used by dissenters (*Duke of Richmond v. Earl of Fife's Trustees, supra*), nor can it legally be applied to the use or accommodation of the public generally. but subject to restraints on use. Where, however, a public body has for long been accustomed to meet within the parish church, and where there is no other suitable place of meeting, it does not appear that any reasonable ground of objection could exist to the church being used for such a

purpose, provided the heritors consented. It was the heritors' duty, however, to guard in the strictest manner against any unseemly use of the church, and to prevent any chance of injury being done to the fabric or to the ecclesiastical furniture. No rent could properly be charged for the use of the church, which indeed could only, it is thought, be granted under exceptional circumstances for use for other than religious services—in which term Sunday schools might be justifiably included. (Cf. 37 & 38 Vict. c. 20, *infra*.) In former times portions of the church were commonly used in some parishes for ordinary school instruction, as, for example, in Mauchline (Edgar, "Old Church Life in Scotland," p. 10).

Exemption of
churches
from rates.

By 28 & 29 Vict. c. 62, churches, chapels, &c., were exempted from payment of poor rates. By 37 & 38 Vict. c. 20 (1874) the exemption was extended to all rates. The Act consists of but one section: "No assessment or rate under any general or local Act of Parliament for any county, burgh, parochial, or other local purpose whatever, shall be assessed or levied upon, or in respect of any church, chapel, meeting-house, or premises in Scotland exclusively appropriated to public religious worship . . . provided also that such exemption shall continue although such church, chapel, meeting-house, or other premises, or any room belonging thereto, or any part thereof, may be used for Sunday or infant schools, or for the charitable education of the poor."⁶ Under the Rating (Scotland) Act, 1926, sec. 11, this section ceases to have effect as regards local rates payable by the owner of any church or other exempted premises in respect of which such owner receives rent therefor and

⁶ It was held in the Lanarkshire Sheriff Court that the cost incurred by a town council in laying a pavement in front of a church was not an "assessment," but a charge for work done under the General Police Act, 1862, and consequently did not entitle the church to exemption from payment under the Act 37 & 38 Vict. c. 20 (*Coatbridge Town Council v. Evangelical Union Church*, 1892, 8 Sh.Ct. Rep. 200). See also the cases of *College Street U.F. Church and Others v. Edinburgh Parish Council*, 1907, 3 F. 414; *Pollokshaws Town Council v. Pollok Street U.F. Church*, 20 Sh.Ct.Rep. 280; and *Grieve v. Corporation of Greenock*, 32 Sh.Ct.Rep. 247, *supra*, Chap. III., p. 89.

does not himself occupy the church, &c.; and the corresponding exemptions under the Burgh Police Act, 1892, sec. 373, are similarly qualified.^{6a} The Ecclesiastical Assessments (Scotland) Act, 1900, 63 & 64 Vict. c. 1900, by sec. 3, sub-sec. (1), provides that no assessment imposed for the purposes dealt with under that Act on the real rent shall be "levied upon lands and heritages occupied solely as the church, and accessory buildings or burying-ground attached, of any religious body in Scotland, or as the dwelling-house with offices, or garden or glebe land attached, of the minister of such church." This provision is repeated in sec. 28 (6) (a) of the Property and Endowments Act, with regard to assessments which may fall to be levied upon real rent under that section.

In the *Shettleston* case the Sheriff refused to order the heritors to erect a CHURCH HALL. He observed: "It is no doubt the case that no church of importance is now built without a hall, but that is for congregational purposes only, and not for any purposes directly connected with the administration of religious ordinances." In the section of the Property and Endowments Act, 1925, dealing with churches, &c., in parishes *quoad sacra*, "the expression 'church' includes the fabric and site of the church AND HALL (if any)" (sec. 34 (4)). In the *Shettleston* case objection was subsequently taken to the fact that the plans approved did not give accommodation for 1200 sitters in addition to the choir. The choir, it was urged, must be regarded as acting in an official capacity, and not included among the ordinary sitters for whom accommodation had to be provided. The Sheriff found the contention not to be well founded. "The choir are sitters in the church as much as the ordinary members or adherents, and whether they are accommodated in the choir seats or the body of the church is quite immaterial."

Church hall.

Seats used by choir included in estimating accommodation available for parishioners.

^{6a} On the effect of the Rating (Scotland) Act, 1926, 16 & 17 Geo. V. c. 47, on liability to rates, cf. note in Appendix, *infra*, pp. 619 *et seq.*, and *Queen's Park West U.F. Church v. Glasgow Corporation*, 1927, 44 Sh.Ct.Rep. 13.

Heritors
bound to pro-
vide bell, but
not a steeple.

A STEEPLE is not a necessary pertinent of a church (*Earl of Home v. Heritors of Eccles*, Feb. 7, 1777, Br. Supp. 558), but a BELL is (*Parish of Inverkeithing v. Lady Rosyth*, 1642, Mor. 7914). There is a case in which it was laid down by certain of the judges that the Established Church alone is entitled "to assemble her members for public worship by the sound of a bell" (*M'Naughton v. Magistrates of Paisley*, 1835, 13 S. 432, at pp. 434-35). But this *dictum* was not necessary for the decision of the particular case, in which magistrates were interdicted from ringing the bell of the town parish church for purposes other than national rejoicings and the daily summoning of labourers to and from their work according to usage and with the acquiescence of the minister and session. The *dictum* in question was therefore *obiter*: and it affirms a legal rule which finds no support in modern practice or decision so far as it suggests a restraint on the right of use of bells other than those associated in some way with a parish church.

This view is quite consistent with the decision of the House of Lords in the later case of the *Magistrates of Peebles v. Kirk-Session of Peebles*, 1875, 2 R. (H.L.) 117. On the rebuilding in 1779 of the parish church of Peebles, a parish partly burghal and partly landward, it was agreed between the heritors of the parish and the magistrates of the burgh that a steeple should "be carried up on the east end of the church" at the sole cost of the burgh, which steeple, when finished, with the bells, &c., therein, to be the sole property of the burgh for ever, the bells, however, to be employed for the parish as well as the town." The steeple was completed in 1784, and the burgh bells were thereafter hung in it.

The magistrates and kirk-session having come to be at variance as to the use of the bells, went to law. The House of Lords, affirming the judgment of the Court of Session, held (1) that having regard to the circumstances of the contracting parties at the date of the agreement, and specially to the fact

that the heritors were bound to provide a bell for the parish church, the agreement was to be construed as conferring on the parish the exclusive right to use the bells for ecclesiastical purposes; and therefore (2) that the town council were not entitled to order the bells to be rung on Sundays, or national and parochial Fastdays, for the purpose of intimating worship elsewhere than in the parish church at such hours as might be fixed by the kirk-session.

The Lord Chancellor (Cairns) observed: "The same law [Scots] would have thrown upon the heritors the obligation of providing or furnishing the new church with a proper bell; but the law would cast no obligation upon the heritors to provide a steeple for the reception of the bell, or to ornament the church in any way with a steeple as part of its architecture" (p. 119).⁷

The parish church and parochial schoolhouse of New Monkland were entered on the valuation roll with the heritors as proprietors. They appealed, and alleged that the parish church and school were not "lands and heritages," and did not constitute separate tene-
Parish churches not appropriate subjects for entering on valuation roll.

⁷ The commissioners from the Presbytery of Kirkcaldy to the parish of Kinglessie reported on 30th January, 1649, "That they having visited the said kirk fand the necessitie of repairing the Kirkyaird dykes and *Bell house* and dealt with the parochiners that a stent might be made for that effect. The Presbyterie approves their diligence" ("The Presbyterie Book of Kirkcaldie," p. 332). Again, 26th June, 1644, "Anent an questioun whidder it be lawful or not to demolish the steiple of Leslie (which is ruinous) for reparatioun of the kirk whilk is also ruinous and newlie to be repaired; anser, not; bot let them repair the steiple also seeing it is ane old monument" (*Ibid.*, p. 271).

Of bells in country churches Mr. Eeles writes ("Church and Other Bells of Kincardineshire," p. 8)—

"There are several peculiar uses which are undoubted survivals, and demand special attention. These are the times of the ringing of church bells (apart from immediately before services), and, to a less extent, the times of ringing of town bells. In many parishes the practice still remains of ringing the bell at 8 a.m., or some other early hour, long before the time of the present service, and the hours at which this is done often give a clue to the times of the mediæval services, being in point of fact the ringing for them. In some churches the bell is rung at 8 and 10, the service being later. Here the first is probably the matins bell, and the second the mass bell—evidently a low mass, it being perhaps probable that there was also a high mass later. Those places where the bell is rung at 10 only are usually of this class, the 8 o'clock ringing having been discontinued. In other churches, apparently those which are more out of the way, or of less

ments, but were pertinents of the respective properties of the heritors, and were *extra commercium*, and of no value. The assessor stated that the statute required all lands and heritages to appear in the roll, without reference to the tenure or the purpose for which they were used. The Commissioners of Supply of Lanarkshire ordered the entries not to stand on the roll. The Court held that the Commissioners were wrong (*Heritors of New Monkland*, 1872, 11 M. 986). This decision was, however, reconsidered in *The Heritors of Kingoldrum, &c.*, 1877, 4 R. 1149, "T. 8 No. 123," where it was held that as parish churches cannot be the subject of a lease, they should not be put on the valuation roll. (See also Armour on "Rating in Scotland," 1892, p. 185.)

The right to the occupation of sittings in a parish church, and to let such sittings, and the application of the pew rents where sittings are let are dealt with elsewhere. (See *infra*, Chap. V., p. 195; *supra*, Chap. I., pp. 20-21; and Chap. II., pp. 55 and 111.)

15 & 16 Geo.
V. c. 33.

General aims
of Act as
churches.

POSITION UNDER THE CHURCH OF SCOTLAND (PROPERTY AND ENDOWMENTS) ACT, 1925.

The provisions of the Property and Endowments

importance, we find the bell rung at 9. Here there was probably only one mass, the 9 o'clock bell being for matins. In these cases the mass would have been about 11, hence there is no 10 o'clock bell, and the mass bell does not remain separate from the modern service bell, where that service is not very late; where, however, it is late, the mass bell does remain, being usually rung at 11, and occasionally at 10.30." In towns, church bells are frequently town bells as well. "Besides various meal hours through the day, 5 or 6 in the morning, and 8, 9, or 10 at night, are the usual times for ringing of town bells or their substitutes. The early morning ringing seems to be simply to call work-people, but the evening bell may well be the survival of the curfew. In the latter part of the 17th century at Elgin, both the great bell of St. Giles and the Tolbooth bell were rung at 4 a.m. The Tolbooth bell at Aberdeen is now rung at 5 a.m. and 8 p.m., and also for meetings of the Town Council. The 10 p.m. bell remains in many places, among which are St. Andrews, Perth, Dundee, Montrose, and Forfar. Ellon supplies a good instance of the way in which the adaptation of an old custom to modern needs has obscured the purpose of its introduction. There the church bell is rung at 8 p.m. in summer and 7 p.m. in winter, and this seems to be the remnant of the curfew. Now, however, it is looked upon as the signal for shutting the shops, and to such an extent that since Wednesday became the 'shopkeepers' half-holiday' it has been rung on that day at 2 p.m." (*Ibid.*, pp. 10, 11).

Act, 1925, in relation to parish CHURCHES are directed to achieve a threefold object—

(1) Their primary purpose is to provide for trans-
ference of the right of property in all churches to the
General Trustees of the Church of Scotland, thus
superseding the qualified right of property hitherto en-
joyed by the heritors on behalf of the parishioners in
the case of old parishes *quoad omnia*, and substituting
the General Trustees for local and *ex officiis* Trustees
in the case of churches which are presently held by
such Trustees.

(1) Transfer
of property
title to
General
Trustees.

(2) As a corollary to this transfer of the right of
property, the Act contemplates the release of the
heritors from, and the ultimate assumption by the
Church of Scotland of, the duty of maintaining and
repairing the fabrics of the churches when transferred.

(2) Transference
to
church of
duty of future
maintenance.

(3) Provision is made whereby, before the
churches, &c., are transferred, they shall be put into
a “reasonable state of tenantable repair” by the
heritors where the duty of maintenance and repair has
hitherto rested on them; and in certain other cases
the matter is to be dealt with under schemes to be
issued by the Scottish Ecclesiastical Commissioners,
who may, so far as they deem just and equitable, pro-
vide for the continuance of periodical payments which
have been in use to be made by burgh authorities,
&c., for maintenance of fabrics and ownership charges.

(3) Provision
for repair
prior to
transference.

So far as the transfer of property goes, the Act
covers all churches of the Church of Scotland (with
the exception perhaps of certain of the old Cathedrals,
the property of which is still to some extent vested in
the Crown and administered by the Board of Works).
But the precise method by which this transfer is to
be accomplished and the details of the incidental
procedure vary according as the church answers to one
or other of the following descriptions:—

Transference
of property.

- (a) The church of an old landward or burghal-
landward parish *quoad omnia*;
- (b) A “burgh church”;

- (c) A "Parliamentary" church;
- (d) A church in one of certain parishes *quoad omnia* erected under the New Parishes (Scotland) Act, 1844;
- (e) The church of a parish *quoad omnia* in respect of which a Sheriff on being applied to makes an order that it shall be dealt with by the Commissioners; or
- (f) The church of a parish *quoad sacra*.

Scope of Part
III. of Act.

Old parishes
quoad omnia.

In Part III. of the Act are contained its provisions regarding transfer of, *inter alia*, the churches in parishes *quoad omnia* generally, and of all rights of property therein and duties of maintenance and repair or extension of these churches. The provisions of this part of the Act have effect and apply to *such parishes only*—a qualification which is important in regard to certain ancillary provisions, such as, *e.g.*, those relating to rights in and the letting of sittings (sec. 29). And even of parishes *quoad omnia* there are certain which are entirely excluded from the operation of Part III., viz., (a) the ten parishes *quoad omnia* enumerated in the Eighth Schedule to the Act, being parishes erected under the provisions of the New Parishes (Scotland) Act, 1844; and (b) "burgh churches," both of which are separately dealt with.

Stay of pro-
ceedings
under
Ecclesiastical
Buildings
and Glebes
Act, 1868
(31 & 32 Vict.
c. 96, sec. 3).

By sec. 27 of the Act it is provided that "no proceedings relating to any of the matters mentioned in sec. 3 of the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868, shall be instituted or entertained before or by any Presbytery or any Court of law or the Commissioners except as hereinafter in this Act provided." The foregoing provision shall be deemed to have had effect as on and from the first day of February, nineteen hundred and twenty-five, subject to the qualification stated below.

Among the matters falling within this provision as being mentioned in sec. 3 of the Act of 1868 are "proceedings before any Presbytery of the Church of

Scotland relating to the building, rebuilding, repairing, adding to, or other alteration of CHURCHES or manses, or to the designing or excambing of sites therefor." In respect of these matters, therefore, no proceedings can be instituted or entertained after the date mentioned. But this restraint is declared to be without prejudice to any proceedings instituted before that date or to the enforcement of any order, finding, judgment, interlocutor, or decree made, given, or pronounced therein, or to any contract or agreement made by heritors before that date or to any resolution passed by heritors to levy an assessment to meet expenditure incurred in pursuance of such contract or agreement, and any such assessment shall be recoverable as if the Act had not been passed (sec. 27).

Saving of proceedings instituted before 1st February, 1925.

In substitution for the proceedings which are thus superseded, the Act contains in sec. 28 a series of provisions dealing with, *inter alia*, CHURCHES, which are directed to achieve the objects already indicated. These, so far as affecting CHURCHES, are in the following terms:—

28.—(1) Where the General Trustees are of opinion that any CHURCH or manse is not in a reasonable state of tenantable repair^{7a} and that the duty of executing repairs is incumbent upon heritors, the General Trustees may agree with the heritors concerned for the repair of the same by or at the expense of the heritors or for the payment by the heritors to the General Trustees of a sum of money in lieu of repair, and failing agreement the General Trustees may, within three years after the passing of this Act, apply to the Sheriff for an order directing the heritors to carry out such repairs (if any) not involving structural alterations^{7a} as he may consider necessary, or, if the General Trustees shall so require to pay to the General Trustees such sum of money in lieu of repair as the Sheriff may determine. The Sheriff shall deal

Transfer of rights in parish churches and manses.

Agreement for repair or equivalent payment.

Failing agreement, Sheriff empowered to deal with the matter on application by General Trustees within three years from 28th May, 1925.

^{7a} See *Church of Scotland General Trustees v. Ardnamurchan Heritors*, 1927, 44 Sh.Ct.Rep. 83; 1928 S.L.T. (Sh.Ct.) 2.

with any such application in a summary manner, and his decision shall be final.

In any case, Sheriff may issue certificate when obligations implemented.

(2) Any heritor concerned or the General Trustees may apply to the Sheriff for a certificate that all obligations incumbent on the heritors with respect to the CHURCH or manse OF A PARISH have been fulfilled, and the Sheriff shall deal with the application in a summary manner and shall issue a certificate to that effect if the General Trustees STATE OR ADMIT that all such obligations have been fulfilled, or if, failing such statement or admission, he is satisfied either that any agreement or order made as aforesaid has been implemented, or that notwithstanding the absence of any such agreement no application has been made for such an order within three years after the passing of this Act, or that any application for an order so made has been refused. The certificate may be in or as nearly as may be in the form set out in the Eleventh Schedule to this Act,⁸ and shall contain or refer to a description of the subjects whether CHURCH or manse to which it relates, and may be recorded by the General Trustees or by any heritor concerned in the appropriate Register of Sasines.

Which is recordable in Register of Sasines.

Practical steps antecedent to transfer.

The General Trustees have, it is understood, taken steps to obtain, under the general direction of a consulting architect, reports from architects in each locality as to the condition of the ecclesiastical build-

⁸ The form in the Schedule is as follows :—

ELEVENTH SCHEDULE.

CERTIFICATE OF SHERIFF UNDER THE CHURCH OF SCOTLAND (PROPERTY AND ENDOWMENTS) ACT, 1925.

County of
Parish of

I,

, sheriff of

as authorised by the Church of Scotland (Property and Endowments) Act, 1925, hereby certify that all obligations incumbent on the heritors of the said parish, with respect to the subjects mentioned in the Schedule annexed hereto, have been fulfilled.

[Signature and date.]

SCHEDULE.

CHURCH or manse

(Insert or refer to a description of the CHURCH and the site thereof, or the manse (with pertinents, if any) and the site thereof, or both of the said subjects (as the case may be) to which the certificate relates.)

ings in every parish. And it will, of course, in most instances be desirable that the heritors should also for themselves obtain skilled advice as to what is necessary to put the church (or manse, as the case may be) into "a reasonable state of tenantable repair." In judging of this, useful guidance may be found in regard to the standard of such repair from the cases considered in the previous part of this chapter.⁹

No repairs involving STRUCTURAL ALTERATIONS^{9a} on CHURCH or manse can be required. So that, however much out of repair a CHURCH may prove to be, if proceedings in regard to it were not pending as at 1st February last, the problem will not now arise, which has hitherto been one of difficulty, as to whether the church should be repaired or rebuilt. But apparently the heritors will be bound to repair it, although the expense of doing so may be found to be such that, had the former law still been in force, the case would have been one for rebuilding. Generally speaking, however, in such a case the General Trustees will probably regard it as expedient to accept a sum of money equivalent to the estimated cost of repairs under the powers given to them to that effect. The sum so received would be available towards the cost of a new building if it should be deemed inadvisable to spend it in repairing the existing building.

Structural alterations cannot be required.

The parties who in the first instance have to be satisfied as to the sufficiency of the repairs and their proper execution are the General Trustees, subject ultimately to the check of the Sheriff's judgment. Accordingly, there can be no finality in any arrangement to which heritors may come with the minister of the parish (or even with the Presbytery) to accept repairs as sufficient until this has been acquiesced in

How far may matter of repairs be made matter of amicable arrangement.

⁹ Reference may be made to a *dictum* of Blackburn, J., in *Bruges v. Wicktown*, 3 B. & S. 699, as to the relativity of such a standard to the nature of the building with reference to which it is used (C. p. 696 of Report). As to this, cf. Sheriff Strachan's Observations on the *Shettleston* case, cited *supra*, p. 130; *ad finem*.

^{9a} As to the limitation implied in this, see *Church of Scotland General Trustees v. Ardnamurchan Heritors*, 1927, 44 Sh.Ct.Rep. 83; 1928 S.L.T. (Sh.Ct.) 2.

by the General Trustees. At the same time, conference locally between those interested (minister or Presbytery and heritors) or their representatives is in most cases be desirable; and with goodwill on both sides may lead to a tentative arrangement to which the Trustees have shown themselves ready to give their assent, with or without minor modifications. The Trustees have under the Act ample powers in this respect. They may (sec. 28 (2)) STATE OR ADMIT that all obligations have been fulfilled; and by sec. 37 they have power, subject to the provisions of the Act and to the directions of the General Assembly, to compromise or settle any claim against any heritor or other person arising out of anything contained in the Act. And the Trustees have shown themselves to be disposed to favour the adjustment of such questions both as regards churches and manse by friendly conference where this can be accomplished with due regard to the interests with which they are charged.

Church and manse may be dealt with in one certificate, but should generally be dealt with in separate certificates.

The language of sec. 28 (2) in regard to the issue of the certificate to be granted by the Sheriff suggests that it was contemplated by the framers of the Act that the CHURCH AND THE MANSE should be separately dealt with; and in most cases it will probably make for convenience in dealing with the title that there should be a separate certificate for each subject. But the directions given in the form of certificate supplied in Schedule 11 indicate that it would be quite competent to combine both subjects in one certificate if this should in any case be found advisable.

Effect of recording certificate.

The result of the recording of the certificate is defined in sec. 28 (3) thus:—When a certificate issued by the Sheriff under this section has been recorded as aforesaid—

- (a) any liability or obligation incumbent on any heritor in connection with the subjects to which the certificate relates shall be at an end except the obligation or liability to assess or to be assessed for the repayment of any debt existing at the date of the certificate; and

- (b) all rights of property in the said subjects shall by virtue of this Act and without the necessity of any further conveyance vest in and belong to the General Trustees, to the same effect as if a complete feudal title holding of the Crown in free blench farm for payment of a penny Scots yearly if asked only had been duly constituted in favour of the General Trustees.

In the absence of definition of "church" in this part of the Act, questions have in certain cases been mooted as to what is comprised in the transfer here provided for. In some country churches there are what are called "lofts" or "aisles" known by the names of, and sometimes claimed by, particular heritors. The question has arisen whether these pass by the transfer provisions, or are affected by the provisions of sec. 29 as to the allocation of sittings. In particular cases, regard may require to be had to the title alleged, and to the whole circumstances. But, generally speaking, it is difficult to conceive any portion of a building incorporated in the fabric of a parish church which has not become a part and pertinent of the church. The answer to both the questions suggested above must therefore, it is thought, be in the affirmative. But while, under sec. 29, kirk-sessions will, generally speaking, have power to allocate sittings in such parts of churches as are referred to, considerations of common sense and good feeling will doubtless ensure as little interference as is reasonably possible with rights hitherto existing wherever proper use has been made of these.

A further question has been raised as to the obligation to repair and the right to have transferred under sec. 28 ancient ecclesiastical buildings once used as churches, but which have ceased to be so used, although situated in the vicinity of the existing church. In many instances such buildings are not merely disused, but are also ruinous. Having ceased to be occupied

What comprised in transfer of "church."

"Lofts" or "aisles."

Ancient ecclesiastical buildings now disused.

in connection with the services of the parish church, such buildings, whether ruinous or not, have devolved on the heritors; and whatever their rights in regard to them may be (as to which see *Duke of Richmond v. Earl of Fife's Trustees* (Urquhart), 1844, D. 701; and *Russell v. Marquess of Bute* (Rothesay), 1882, 10 R. 302), the buildings are not within the scope of the transfer provisions of this part of the Act, nor do the provisions of sec. 28 in regard to repairs appear to be applicable to them. Any repair necessary to prevent danger to those using the churchyard would seem to be the concern of those now charged with the administration of the churchyard (as to which see *infra*, Chap. VI., pp. 216, &c.).

Exceptional cases may be referred by Sheriff, on application by parties interested, to the Commissioners.

To meet certain exceptional cases in which the ordinary obligation of the heritors in regard to the ecclesiastical buildings of the parish are either shared by or are entirely incumbent on other persons or bodies, provision is made in sec. 28 (4) and (5) as follows:—

(4) Whereas in certain parishes, town councils in their capacity as town councils, or other public bodies (whether statutory or otherwise) or kirk-sessions or persons are under the present law and practice or by Royal Warrant, charter, agreement or custom liable along with or in place of the heritors in obligations relating to the church or manse, it shall be lawful, in any such case, for the Presbytery or the General Trustees or any other person concerned to apply to the Sheriff to find and declare that the case ought to be dealt with by the Commissioners, and if the Sheriff so finds and declares, the provisions of this section shall have no further application to the case, and the Commissioners shall as soon thereafter as conveniently may be inquire into all circumstances relating to existing obligations in respect of the fabric and site of such church or manse and the maintenance of such fabric, and by order provide for the transfer to the General Trustees of the said fabric and site, and of all powers

and duties with respect to the maintenance and repair of the said fabric.

(5) If in any application to the Sheriff under this section a question arises as to whether or not the church or manse to which the application relates is the church or manse of a parish within the meaning of this section, that question shall be determined by the Sheriff in a summary manner, and his determination shall be final.

The provisions for assessment for meeting the costs of anything done or agreed or ordered to be done in pursuance of sec. 28 have already been fully considered in Chap. II. (*ante*, pp. 48, &c.; 71, &c.); as have those affecting the method of summoning meetings of heritors which it is necessary to call for the purpose of that section, and the procedure at such meetings. (See *ante*, pp. 58, &c.) "Heritors concerned" in the sense of sec. 28 would appear to be those heritors who, but for the Act, would have been liable to maintain the subjects. Whether in any particular case these will be "real-rent heritors" or "valued-rent heritors" only will depend on the general principles of liability discussed in Chap. II., *supra*, pp. 71, &c., in dealing with the assessability of heritors.

On the expiry of one year from the date on which any church is by or in pursuance of the Act transferred to the General Trustees the right of allocating sitting accommodation in the church, whether with or without payment therefor, and the right of disposal of any proceeds therefrom shall belong to the kirk-session, or to such other body as the General Assembly may direct, and any existing right to such accommodation shall cease and terminate (sec. 29).

This provision, being contained in a section in Part III. of the Act which applies to churches in parishes *quoad omnia* only, does not affect the rights in regard to the letting of sittings and the application of the rents in the churches of parishes *quoad sacra*, nor in the burgh churches enumerated in the Ninth

Assessments
for repairs.

Rights with
respect to
sitting accom-
modation
in parish
churches
quoad omnia.

Schedule, nor in the Parliamentary charges enumerated in the Tenth Schedule, nor in the ten parishes *quoad omnia* scheduled for separate treatment in the Eighth Schedule. In regard to the latter classes the Commissioners may provide by their orders made under secs. 22, 23, and 24. (See *infra*, pp. 152, &c.; 158, &c.; and 161.) But the provision does apply to all churches which by virtue of sec. 26 fall under Part III. of the Act, even though they may, by finding of the Sheriff under sec. 28 (4), have been appointed to be dealt by order of the Ecclesiastical Commissioners. For it is only the provisions of sec. 28 which on such a finding by a Sheriff cease to affect the church to which it applies. (See *infra*, p. 163.)

Preservation
of monu-
ments, &c.,
in churches
transferred.

While the use of a parish church as a place of burial is not lawful or proper, it is probable that in the case of some of the older church burials within the church have taken place, and in such cases proper tombstones may have been erected; and, of course, stones of the nature of monuments and other memorials of the dead are common, and are indeed recognised as specially appropriate, in parish churches. Care has been taken in the Act to secure for persons interested in such tombs or memorials, as relatives of those interred therein or commemorated thereby, the opportunity of seeing to their preservation and maintenance. Any person who satisfies the General Trustees that he has an interest in any burial ground, enclosure, tombstone, monument, or other memorial in a parish church on the ground of relationship to the deceased person or persons therein buried or thereby commemorated shall be entitled, with the approval of the General Trustees, to provide for the preservation and maintenance of the same (sec. 33).

The method of provision is not defined. Doubtless that most frequently adopted will be a money provision or endowment. But the terms of the section are quite wide enough to entitle parties interested to make the necessary provision by directly providing for the necessary labour, or by personally doing what

is needed, so long as the General Trustees approve. Sec. 33 being included in Part III. of the Act, its provisions only apply to the churches in parishes to which that part of the Act applies, *i.e.*, churches in parishes *quoad omnia*, as defined, *supra*, p. 147. Similarly, churches in such parishes are, for the reason already explained, within the provision, even although they may have been taken out of the operation of sec. 28 by having been made the subject of orders by the Sheriff remitting them for treatment to the Commissioners. Sec. 33 is not, however, applicable to burgh churches, Parliamentary churches, or the churches of the ten parishes *quoad omnia* enumerated in Schedule VIII. But the powers of the Commissioners are sufficient to entitle them to make provision in their orders for any necessary protection in the case of churches falling to be dealt with by them. (See sec. 21 (1) (k).)

The comparatively simple machinery supplied in the Third Part of the Act seems to have been regarded as adequate only for the cases of churches in parishes *quoad omnia*, in which the obligations as to maintenance and repair rest upon the heritors, and are those defined by common law. In the cases of the other classes of church mentioned above (pp. 139, 140), the incidence of the duty to maintain and repair is more complicated. This duty may depend upon obligations varying in their extent and nature, and resting upon others who are bound either along with or in substitution for the heritors, whose obligations have arisen from various sources consuetudinary, or are prescribed by the Acts of Parliament under which the churches have been built or the parishes erected, or have been assumed by contract, and have, in many instances, been incurred for onerous causes. In order to meet cases of this kind the method adopted has been that of remitting them for disposal to a Commission with executive powers appointed by the Act for this and other purposes. This Commission is empowered, after inquiry into

Provision for the case of churches other than those dealt with in Part III. of Act: powers of Commissioners.

Those to be
dealt with by
the Scottish
Ecclesiastical
Commis-
sioners.

Creation of
Commis-
sioners and
scope of its
powers.

circumstances, to provide for the necessary transfer to the General Trustees by an order in each particular case in terms suited to its circumstances. The Commission is known as "The Scottish Ecclesiastical Commissioners," but is in the Act generally alluded to, and is hereinafter referred to, as "The Commissioners." Its constitution and powers are defined in Part II. of the Act. For present purposes the provisions relating to it may be summarised as follows:—

By sec. 20 His Majesty is empowered to appoint not more than five persons as Commissioners under, and for the purposes mentioned in, the Act, one of the Commissioners being a person who holds, or has held, judicial office to be appointed chairman. Among the powers given to the Commissioners are those necessary for determining the procedure of the Commission, its place of meeting, and the authentication of its documents; and provision is made for supplying the Commission with the necessary staff, and for the salaries and remuneration of the staff and other expenses of the Commission out of moneys to be provided by the General Assembly for that purpose. Further, for enforcing the attendance of witnesses, the examination of witnesses on oath, and the production of books and documents, the Commissioners have conferred upon them all such powers, rights, and privileges as are vested in any of His Majesty's Courts of law (sec. 20 (5)). They may act by any one or more of their body and notwithstanding any vacancy (which may be filled up from time to time, as occasion requires); but if any person aggrieved by any order or decision of one Commissioner so requires, the order or decision shall be reconsidered on re-hearing by not less than three Commissioners (sec. 20 (3)).

The Commission was duly appointed by His Majesty by Warrant under the Royal Sign Manual of date 22nd September, 1925, which is printed in the Appendix, p. 613. The Commission immediately began to function in the matters committed to it,

taking up in the first instance those with which this chapter is concerned.

With regard to *burgh churches*, the Commissioners are empowered (sec. 21 (1) (a)), after such inquiry in each individual case as they may think fit, to make such orders as they may consider necessary or proper for giving effect to the schemes framed by the Commissioners under the provisions of this Act relating to burgh churches, *including the modification* of the Act 23 & 24 Vict. c. 50, entitled "An Act to abolish the annuity tax in Edinburgh and Montrose, and to make provision in regard to the stipends of the ministers in that city and burgh, and also to make provision for the patronage of the church of North Leith," and of *any other local or personal Act, decree of the Court of Session or Court of Teinds or agreement relating to the burgh churches*.

Burgh
churches.

Power to
modify
certain Acts,
decrees, and
agreements.

Following up this general power, the following section, (22), contains provisions for the Commissioners framing schemes relating to and otherwise dealing with the "burgh churches," being those mentioned in the Ninth Schedule to the Act. These comprise 45 churches in all, of which 6 are in Aberdeen, 1 in Dumfries, 4 in Dundee, 14 in Edinburgh, 8 in Glasgow, 2 in Greenock, 1 in Kilmarnock, 3 in Paisley, 3 in Perth, 1 in Queensferry, and 2 in Stirling. In their origin and history these churches present great variety of conditions. And the same is the case in regard to the circumstances of their maintenance and repair, and the obligations in regard thereto. In many, if not in most, of the towns in which these churches are found the town benefited, through its common good or otherwise, from grants of church lands or properties at and subsequent to the Reformation; and in many instances there have been gifts and mortifications made for the benefit of the churches. Obviously, therefore, very different considerations may arise in regard to provision for the maintenance of such churches after transfer to the

Churches
affected.

Variety of
conditions
requiring
consideration.

General Trustees from those governing the case of the parishes *quoad omnia* dealt with in Part III. of the Act—considerations, too, which will be found to vary with the circumstances of each particular case. It was doubtless in view of this that it was found necessary to provide for inquiry and individual treatment of these cases. This is done under sec. 22, the provisions of which, so far as affecting CHURCHES, are as follows:—

Power to
frame
schemes.

(1) As soon as conveniently may be after the passing of this Act the *Commissioners shall inquire into all circumstances relating to existing rights of property in the fabrics and sites of the BURGH CHURCHES, and any manses or other subjects connected therewith, and in any churchyards connected with the burgh churches, the stipends of the ministers thereof and any funds, endowments, pew rents or assessments from which the stipends of the ministers, the MAINTENANCE OF THE CHURCHES and other subjects, and any other expenditure in connection therewith is defrayed, and shall thereafter frame schemes for the future ownership, maintenance, and ADMINISTRATION OF THE BURGH CHURCHES and other subjects and the payment of stipend to the ministers:*

Contents of
schemes.

(2) Every such scheme shall make provision for—

Transfer of
churches, &c.

(a) the transfer to the General Trustees of all rights of property vested in or belonging to the magistrates or the town council of any of the burghs within which the burgh churches are situated in the FABRICS AND SITES OF THE BURGH CHURCHES and of any manses *and other subjects connected therewith*, and in any churchyards connected with the burgh churches, and for the transfer to the General Trustees of the duty of maintaining any property so transferred;

(b) the transfer to the General Trustees of all or any PROPERTY HELD FOR CHURCH PURPOSES by or on behalf of the magistrates or the

And of prop-
erty held
for church
purposes.

town council of any of the burghs within which the burgh churches are situated;

- (c) the periodical payment to the General Trustees . . . (so far as the Commissioners consider this to be equitable and reasonable) of all sums which are at present PAID OR PAYABLE by the magistrates or town council of any of the said burghs IN RESPECT OF THE OWNERSHIP AND MAINTENANCE OF THE FABRICS AND SITES OF THE CHURCHES AND MANSES, or other subjects connected therewith; Provision for periodical payments to General Trustees (in discretion of Commissioners) of sums presently payable by magistrates for upkeep.

- (d) the redemption of such periodical payments by the payment to the General Trustees of a capital sum or by the creation of terminable annuities or of sinking funds; And for redemption thereof.

* * * * *

- (g) the protection (so far as the Commissioners consider this to be practicable) of the interests of town councils IN THE BURGH CHURCHES as regards SITTINGS allotted to the town councils for their use, the right to have the church bells rung on special occasions, and the preservation of any other similar right or privilege hitherto enjoyed by the town councils; For protection of interests of town council in sittings, &c.

- (h) the General Trustees before selling, feuing, or otherwise alienating A BURGH CHURCH, AND THE SITE THEREOF, giving to the town council of the burgh in which such burgh church is situated an opportunity of acquiring the same on such terms and conditions as may be agreed upon or as, failing agreement, may be determined by an arbiter to be appointed by the Sheriff on the application of either party, provided as follows:— General Trustees before alienation to give town council opportunity of acquiring church on terms set forth.

- (i) The price to be paid to the General Trustees by the town council shall

not exceed such a sum as would be necessary to reinstate THE CHURCH on a new site within the municipal boundaries of the burgh in which such burgh church is situated, should it in the judgment of the General Trustees be necessary to provide at the time A NEW CHURCH within the municipal boundaries of such burgh;

- (ii) in the event of it being unnecessary in the judgment of the General Trustees to provide at the time A NEW CHURCH such as aforesaid, the price to be paid to the General Trustees by the town council shall not exceed such a sum as would be necessary to reimburse the General Trustees for all expenditure incurred by them subsequent to the passing of this Act, and within forty years prior to the date of the sale, for the repair, enlargement, or renewal of such burgh church, or part thereof, or as the case may be to liquidate any outstanding debt or obligation incurred or undertaken by the General Trustees relative to any such repair, enlargement, or renewal (*so far as such expenditure, debt, or obligation has not been met out of any periodical payment made by the magistrates or town council of such burgh for the maintenance of such burgh church, or out of any capital sum, terminable annuity, or sinking fund*

paid in respect of the redemption thereof), and to meet the expenses of the necessary conveyance:

The terms of sec. 22 (2) (c), read along with those of 22 (2) (h) (ii) just quoted, show that in regard to burgh churches liability to maintain the fabric may, if the scheme so provides, endure even after transfer to the General Trustees, and is not necessarily exhausted by putting the church into a reasonable state of tenantable repair before transfer, as would be the case with churches in landward parishes transferred under sec. 28. The obligation can never, it is thought, be less than in the case of these churches. For the duty to maintain in such repair is practically just the common law obligation of those who have become responsible by obtaining a decree of erection (*Clapperton v. Edinburgh Magistrates*, 1840, 2 D. 1385, *passim*, especially pp. 1409, 1420, 1423, and 1428; and, 1846, 8 D. 1132). But where circumstances justify it (as, *e.g.*, where a corporation has had laid upon it the duty of providing a church in return for lands, &c., conferred on it), the Commissioners may provide for a continuing periodical payment in respect of the costs incidental to ownership and maintenance of the fabric of a transferred church (sec. 22 (2) (c)) in so far as it seems to them just and equitable to do so. And the words in sec. 22 (2) (h) (ii), quoted in italics above, show that such periodical payment may, unless redeemed, continue long after the church has passed into the hands of the General Trustees. There is no similar provision for continuance of periodical payments which have been in use to be made for expenses of the conduct of services in a burgh or other church, and this cannot, therefore, be appointed in a scheme. But where there has been a fund, such as seat rents or an endowment, from which the burgh has been enabled to meet both classes of payments in whole or in part, it is thought that, if this be transferred to the General Trustees, the burgh is not entitled to claim

that it shall be wholly applied towards reduction of the periodical payments which would otherwise be required for fabric charges, without regard to the other administration charges formerly borne by the burgh, but of which they will for the future be relieved by the General Trustees.^{9b} In the case of seat rents, indeed, the cost of providing the appurtenances of worship is an essential condition of the existence of any fund.

The provisions above quoted restrictive of alienation of a BURGH CHURCH, conceived in favour of the town council, being contained in a sub-section of sec. 22, which prescribes the contents of the Commissioners' schemes, must therefore apparently be incorporated in each such scheme. As, however, they are in their nature directory, and seem to be intended to apply uniformly to every case, they would more appropriately have been made matter of general enactment, as is done with the further restriction next to be noticed.

Further right of pre-emption given to town council which has declined to acquire on terms set out above.

Even should the town council decline to avail itself of the opportunity of acquiring, upon the terms above recited, a BURGH CHURCH of which the General Trustees desire to dispose, the Trustees have not quite a free hand in disposing of it to others. It may very well be that, the council having declined to acquire the subjects on the terms specified, the Trustees may have an opportunity, and may be willing, to part with the subjects to one desiring to acquire them, for a less price it may be. But by sec. 22 (3) the town council is given another opportunity (which does not require to be made matter of provision in the Commissioners' scheme) of acquiring the subjects at the price which the General Trustees are prepared to

^{9b} In an unreported case at the instance of the *Ministers of Aberdeen v. the Magistrates* (1796), the Lords Commissioners of Teinds in their final decreets of 12th February and 14th May, 1796, *inter alia*, found "that the said ministers have no exclusive right to the seat rents, but that the same were given to the magistrates to enable them to pay the ministers' stipends, as that these rents must interally be burdened with the expense of upholding the fabric of the church and paying the dues of headles, bellringers &c."

accept from the outsider. The section is in these terms:—

(3) The General Trustees shall not be entitled to sell, feu, or otherwise alienate ANY OF THE BURGH CHURCHES or the site thereof to any person unless they shall have previously offered to convey SUCH CHURCH OR SITE to the town council of the burgh in which such church is situated, on the same terms and conditions as they may be prepared to accept from such person, and the town council have failed to reply to the offer within a period of one month from the date thereof, or have within that period declined to accept the offer:

(4) [Relating to graveyards of certain churches.]

(5) In the application of paragraphs (b), (c), and (d) of sub-section (2) of this section to any scheme framed with respect to any of the BURGH CHURCHES the Commissioners shall have regard to the conditions contained in the decree of disjunction and erection of the burgh church. (But under sec. 21 (1) (a) a scheme may competently provide for modification of such a decree, cf. *supra*, p. 151.)

Schemes to have regard to terms of decree of disjunction and erection.

(6) When all matters contained in the scheme relating to a BURGH CHURCH have been duly carried out and implemented, all liability or obligation incumbent on the magistrates and town council of the burgh in which a burgh church is situated, in connection with the upkeep and maintenance of such BURGH CHURCH and payment of stipend to the minister thereof, shall be deemed to have been fulfilled and shall be at an end, subject only to the payment of any capital sum, terminable annuity, or sinking fund for the redemption of any periodical payment made by such magistrates or town council in connection with the maintenance of such church and the stipend of the minister thereof.

On implementation of scheme, termination of liability of magistrates and town council.

It is provided that nothing in the Act shall affect or be deemed to affect the RIGHTS OF SUPERIORS OF THE SITES of the churches mentioned in the Ninth Schedule to this Act (where the superiorities are not held by

Saving of rights of superiors of the sites of burgh churches.

or on behalf of town councils) to payment of their feu-duties from the parties in whom the *dominium utile* of the said sites is vested by this Act or otherwise, and to all other rights and privileges vested in such superiors prior to the passing of the Act (sec. 46).

A special provision in regard to EDINBURGH is contained in sub-sec. (3) of sec. 21 in the following terms:—

Special provision in regard to Edinburgh.

In respect that the Act 23 & 24 Victoria, chapter 50, imposed an obligation on the town council of Edinburgh to grant a bond of annuity for the annual sum of four thousand two hundred pounds to the Edinburgh Ecclesiastical Commissioners for the purposes of the said Act, and in respect that the Act 33 & 34 Victoria, chapter 87, empowered the said town council to redeem the said bond of annuity by a payment to the said Commissioners of the sum of fifty-six thousand five hundred pounds and that the said bond of annuity was so redeemed by the payment of the said sum to the said Commissioners nothing contained in this Act or in any order to be made by the Commissioners under the provisions of this section shall impose or be deemed to impose any further financial obligation or liability on the said town council in relation to the burgh churches situated within the burgh of Edinburgh, and any liability or obligation incumbent on the said town council in connection with the upkeep and maintenance or restoration or renewal of the burgh churches situated within the said burgh or payment of stipend to the ministers thereof shall be deemed to have been fulfilled and shall be at an end.¹⁰

“Parliamentary” churches in Schedule X.

In the Tenth Schedule to the Act are enumerated a number of CHURCHES, which, with certain manses, are dealt with under the description of “PARLIAMENTARY CHURCHES AND MANSES.” These were erected

¹⁰ The Commissioners have issued their scheme for the Scheduled Edinburgh City Churches, which is identified as Scheme No. 7 (Edinburgh Burgh Churches) and is dated 30th December, 1926. It may be usefully referred to as a guide to the lines on which other schemes will probably be framed as regards points of general application.

with moneys furnished by Parliament, by Commissioners created and acting under the Acts 4 Geo. IV. c. 79 and 5 Geo. IV. c. 90 in a number of districts in the Highlands and Islands of Scotland. (See Chap. I., *supra*, pp. 24 and 43.) Under the scheme of these Acts the erection took place on the petition of a heritor or heritors possessed of land to the value of one hundred pounds Scots of valued rent in the parish in which the district to be attached to the church was situated, who were prepared to undertake certain obligations with respect to maintenance. The churches and manses on erection became with their sites vested (as regards title) in the Commissioners appointed under the Acts. Provision was made for the levying of seat rents and the application of these towards upkeep. For any further expense of upkeep of THE CHURCH, the petitioning heritors were required to undertake liability to an extent not exceeding in any one year 1 per cent. on the original cost of THE CHURCH. (See sec. 18 of 5 Geo. IV. c. 90.) There are thirty-five such CHURCHES enumerated in Schedule X. In some cases the original church has been rebuilt or enlarged. In all, the districts have long ago been erected into parishes *quoad sacra* under the provisions of sec. 14 of the New 7 & 8 Vict. Parishes (Scotland) Act, 1844. But in terms thereof c. 44. the obligations, &c., under the Acts of George IV. were continued and held to be in satisfaction of the requirements for erection under the Act of 1844.

The Commission created under the two Acts of 1823 and 1824 has long ceased actively to function. But among the original Commissioners were included the holders of certain public offices and their successors in office. Of these offices, some six still subsist; and, so far as TITLE TO THE CHURCHES AND MANSES goes, it would seem to be formally vested in the present holders of these offices. In most cases it is understood that pew rents have not been levied for many years past; and that in many the obligations on the heritors for repairs have been enforced or implemented but

slackly, if at all. In the last forty years large sums have been annually expended by the Highlands and Islands Committee of the Church of Scotland in the repair of these Parliamentary churches and manses.

Provisions of Property and Endowments Act regarding these churches.

Under sec. 21 (1) (b) of the Property and Endowment Act, the Commissioners are directed, after such inquiry in each individual case as they may think fit, to make such orders as they may consider necessary or proper for the transfer to the General Trustees of these Parliamentary churches and manses under the provisions of the section relating thereto. This is sec. 23, which enacts as follows:—With respect to THE CHURCHES AND MANSES mentioned in the Tenth Schedule to this Act (which together with any land whether described as churchyard, glebe, or otherwise connected with the said churches and manses are in this Act referred to as “parliamentary churches and manses”) the following provisions shall have effect:—

As soon as conveniently may be after the passing of this Act the Commissioners shall inquire into all circumstances relating to existing rights of property in the fabrics and sites of the PARLIAMENTARY CHURCHES AND MANSES, and to the maintenance thereof whether under the provisions of the Act 5 George VI., Chapter 90, and any conveyance or other deed relating to any of the said churches and manses in favour of the Commissioners under the said Act or under any decision of the Court of Teinds or otherwise, and the Commissioners shall thereafter by order provide for the transfer to the General Trustees OF THE FABRICS AND SITES OF THE SAID CHURCHES AND MANSES, and of all powers and duties with respect to the maintenance and repair of the said fabrics and the allocation of sitting accommodation in the said churches.

The parishes *quoad omnia*, ten in number, enumerated in the Eighth Schedule to the Act, were erected under the provisions of the New Parishes (Scotland) Act, 1844, secs. 12 and 13. They may conveniently be described as “GAELIC-SPEAKING CHARGES.” On the narrative that in certain populous places there were a great number of persons, natives of the Highlands and Islands of Scotland, whose knowledge of the English language was not such as to render them capable of receiving the full benefit of religious instruction in that tongue, and of the expediency that some provision should be made for enabling such persons to obtain religious instruction and to have the ordinances of religion administered to them in the Gaelic language, it was by sec. 12 enacted that in disjoining or dividing any large or populous parishes in which there were a great number of such persons it should be lawful to make provision for the spiritual wants of such persons by appointing religious instruction to be communicated to them and the ordinances of religion to be dispensed among them, in the Gaelic language. And sec. 13 provided that where a SEPARATE CHURCH should have been erected for any such Gaelic congregation and a permanent endowment secured for the same, *either from teinds or otherwise*, to the satisfaction of the Teind Court, it should be lawful to erect SUCH CHURCH and the congregation thereof into a separate parish although the members of such congregation might be scattered and no territorial district might be assigned to such parish exclusively; and for the minister and elders of such parish to have and enjoy the status and all the powers, rights, and privileges of a parish minister, or a parish minister and elders of the Church of Scotland, the right to exercise pastoral superintendence or discipline being, however, restricted to those persons who were members of such Gaelic congregation, or of the families of such members, or who were resident

Parishes
quoad omnia
erected under
the New
Parishes Act,
1844; Gaelic-
speaking
charges in
Schedule
VIII.

7 & 8 Vict.
c. 44.

Origin of
these.

within the territorial district, if any, which might be assigned to such parish exclusively.

Of such parishes ten were erected between 1844 and the end of 1865—in North Bute, Shettleston, Calton, Teviothead, Maryhill, Kirkhope, Springburn, Ardoch, Colonsay, and Coll. As parishes *quoad omnia* they were unique in two respects. In the first place, the provision for stipend, &c., need not necessarily be from teinds, but, provided the provision were permanent, it might be from any source which was approved by the Court. And, secondly, they need not have any territorial district attached to them, the parochial link being connection with the congregation, either alone where there was no attached territory, or cumulatively with residence in the territory where there was such.

The case of these parishes provided for by secs. 21 (1) (c) and 24 of the Property and Endowments Act.

The existence of such exceptional conditions obviously rendered these parishes unsuited for treatment under the provisions of the Property and Endowment Act applicable to parishes *quoad omnia* in general. They have accordingly been scheduled and separately provided for under secs. 21 and 24 of that Act. Under sec. 21 (1) (c) the Commissioners are empowered, after such inquiry in each individual case as they may think fit, to make such orders as they may consider necessary or proper for the transfer to the General Trustees of the churches and manse of these parishes. And this is followed up in sec. 24, which provides that—

“ With respect to the CHURCHES AND MANSES OF THE PARISHES QUOAD OMNIA mentioned in the EIGHTH SCHEDULE to this Act, the following provisions shall have effect:—

“ As soon as conveniently may be after the passing of this Act the Commissioners shall inquire into all circumstances relating to existing rights of property in the FABRICS AND SITES OF THE CHURCHES AND MANSES of the parishes aforesaid, and to the main-

tenance thereof whether under any existing titles relating to the said churches and manses or otherwise, and the Commissioners shall thereafter by order provide for the transfer to the General Trustees of the fabrics and sites of the SAID CHURCHES AND MANSES, and of all powers and duties with respect to the maintenance and repair of the said fabrics, and the allocation of sitting accommodation in the said churches."

It has already been pointed out (*supra*, p. 149) that owing to the fact that in certain parishes town councils in their capacity as such, or other public bodies (whether statutory or otherwise), or kirk-sessions, or persons are under the present law and practice, or by Royal warrant, charter, agreement, or custom, liable along with or in place of the heritors in obligations relating to THE CHURCH or manse, it was found necessary to provide for treatment of the case of such parishes specially. With respect to such a parish it is made lawful for Presbytery or the General Trustees, or any other person concerned, to apply to the Sheriff to find and declare that the case ought to be dealt with by the Commissioners. If in any such application any question arises whether THE CHURCH OR MANSE covered by it is the CHURCH OR MANSE OF A PARISH within the meaning of sec. 28, the decision of the Sheriff on the point is declared to be final (sec. 28 (5)). If the Sheriff give the finding desired, the provisions of sec. 28 cease to apply further to the case. And it becomes the duty of the Commissioners as soon thereafter as conveniently may be to inquire into all circumstances relating to existing obligations in respect of THE FABRIC AND SITE OF SUCH CHURCH OR MANSE and the maintenance of such fabric, and by order to provide for the transference to the General Trustees of the said fabric and site, and of all powers and duties with respect to the maintenance and repair

Churches in parishes *quoad omnia* appointed by the Sheriff to be dealt with by the Commissioners.

of the said fabric (sec. 28 (4)). And in furtherance of this the Commissioners are empowered by sec. 21 (e), after such inquiry as they may think fit, to make such orders as they may consider necessary or proper for framing and giving effect, to schemes relating to these churches and manses.

In the case here dealt with (as in that of the burgh churches) the Commissioners' powers extend not merely to framing orders for transference of the fabrics, &c., to the General Trustees, but also to "framing schemes relating to" the churches and manses. Presumably this is designed to enable them in such schemes to provide not only for requiring from the parties enumerated in sec. 28 (4) as liable along with or in place of the heritors in obligations relating to THE CHURCH OR MANSE the execution of such repairs as in the normal case the heritors would be bound to provide for before transfer, but also for vesting the Trustees, if they so think fit, in any right at present vested in those in whom the title to THE CHURCH OR MANSE stands to enforce obligations relating to these subjects which are at present incumbent on these parties, and that by periodical payments or otherwise as the justice of the case may require. The governing consideration in the provision of this exceptional procedure appears to have been the existence of obligations (possibly undertaken for onerous causes) relating to a church or manse in bodies or individuals other than the heritors, either along with or to the exclusion of the heritors. But the obligation of heritors at common law is unlikely to be excluded in any instance unless by the substitution of an obligation at least equally onerous with that resting upon them at common law. It is therefore improbable that circumstances will present themselves in which the Commissioners would feel justified in requiring anything less than provision for that "reasonable state of tenantable repair" which is the general standard. But, on the other hand, the obligations resting by

charter, agreement, or otherwise upon other parties may be so well defined and so extensive as to warrant the Commissioners in imposing, by the scheme which under sec. 21 (1) (e) they are authorised to issue in such a case, a larger or more prolonged liability for repairs than would rest on heritors in the normal case. *E.g.*, if under a charter or agreement a corporation or individual had obtained a grant of property in return for (or had otherwise onerously undertaken) an obligation to uphold the church in all time coming, there would seem to be nothing in the Act to prevent the Commissioners giving effect to this by requiring a continuing payment to cover the repairs undertaken.

If the heritors and other parties contemplated by the sub-section as concerned are agreed as to the incidence and proportions of their respective liabilities, and can come to terms with the General Trustees as to the repairs required (or the equivalent sum), there seems to be no reason for invoking the machinery of the sub-section. On agreement being reached, and the General Trustees being satisfied, a certificate under sub-sec. (2) of sec. 28 may be applied for and recorded; and this will be all that is necessary.

As already indicated (p. 148, *supra*), even a successful application to the Sheriff for a remit to the Commissioners operates only to exclude the case from the operation of "this section" (sec. 28); but leaves it otherwise within the scope of Part III. of the Act, including sec. 29 dealing with seat rents. So that it is conceived that the Commissioners would not have power in any order in a scheme under such a remit to deal with seat rents in a way inconsistent with the provisions of sec. 29.

The position of the parishes *quoad sacra*, of which over . . . have been erected under the provisions of the New Parishes (Scotland) Act, 1844, differs essentially from that of the old parishes *quoad omnia*. In the parish *quoad sacra* the property title to the church, &c., is vested in selected trustees; and the

If agreement, resort to procedure of 28 (4) unnecessary.

Remit leaves case subject to Part III., except sec. 28.

Churches in parishes as *quoad sacra*.

7 & 8 Vict. c. 44.

obligations for the provision, maintenance, and repair of the church depend not on common law but on obligations voluntarily undertaken at the time of the erection of the parish. While, therefore, it has been found to be advisable, in accordance with the general policy of the Property and Endowments Act, to provide for transference of the title to the churches and manse (if any) of such parishes from special trustees to the General Trustees, there are no considerations of equity which require the abrogation or modification of the obligations thus voluntarily assumed. There was therefore no reason for providing for the termination of any obligation for maintenance and repair of the churches and manse of *quoad sacra* parishes, nor for remitting these obligations to be the subject of schemes by the Commissioners. On the other hand, the nature and extent of these obligations and of the powers of the trustees, and of the kirk-sessions and managers of such parishes *quoad sacra*, depend in each case on the terms of the constitution of each as sanctioned in the decree of erection. These constitutions have, within limits consistent with the statutory provisions of the New Parishes Act, 1844, varied considerably in individual cases. For the most part they have been framed on models sanctioned by the General Assembly. Of such models there have been between 1844 and the present date some eleven or thereby more or less different model deeds issued under the sanction of the General Assembly; and probably some deeds have been passed which are not in exact conformity with any of the models. In the more recent model deeds express powers of alteration have been taken; and these powers, having been approved by the Court on erection, could doubtless be exercised. But in the earlier deeds (the majority) no such powers were contained; and in the absence of expression of such powers the constitutions on the basis of which such parishes have been erected under the sanction of the

Court have not been regarded as susceptible of alteration. As many of the earlier deeds of constitution contained provisions which in practice have proved to be inconvenient and provocative of friction between the trustees under the deeds, and the kirk-sessions and managers, this rigidity has long been felt to be inconvenient in practice. And it has, moreover, in recent years come to be more and more regarded as inconsistent with the autonomy properly inherent in the church.¹¹

In regard to parishes *quoad sacra*, therefore, the principal matters for which it was deemed necessary to make provision in the Property and Endowments Act were (1) the transference of the buildings and endowments from the particular trustees provided for under the decrees of erection in each case to the General Trustees; and (2) the recognition of the right of the Church through its General Assembly to make such alterations on the constitutions of the various churches as might from time to time seem to be required. These matters are dealt with in sec. 34 of the Act, which applies to parishes *quoad sacra* erected under the New Parishes Act, 1844, the United Parishes (Scotland) Act, 1868, and the United Parishes (Scotland) Act, 1876—other than parishes erected under sec. 14 of the first-mentioned Act—*i.e.*, those which were formerly districts under 4 Geo. IV. c. 79 and 5 Geo. IV. c. 90, being the “Parliamentary churches” enumerated in Schedule X. of the Act of 1925, which have been dealt with (*supra*, pp. 158, &c.). The provisions of sec. 34 applicable vary according as the parish is one erected (a) before or (b) after the passing of the Property and Endowments Act, *i.e.*,

Principal matters requiring to be provided for.

7 & 8 Vict. c. 44; 31 & 32 Vict. c. 30; 37 & 40 Vict. c. 22.

Parishes erected prior to passing of Act.

¹¹ On this matter, and the position of *quoad sacra* churches generally in relation to their constitutions, much valuable information is contained in (a) A report to the General Assembly in 1899 on *quoad sacra* Churches in relation to their Deed of Constitution, and (b) the Report of the Advisory Committee on Freewill Offerings presented to the General Assembly in 1924.

28th May, 1925. The case of the former is dealt with by sub-sec. (1) of sec. 34, which is in the following terms:—

“Statutory properties” to be transferred to General Trustees :

General Trustees to frame inventory of statutory properties.

(a) The STATUTORY PROPERTIES AND ENDOWMENTS of the parish shall be transferred to the General Trustees as in this section provided;

(b) As soon as conveniently may be after the passing of this Act there shall be prepared by the General Trustees and certified by the Clerk of Teinds with respect to each parish, an inventory referring to this section of this Act and setting out the statutory properties and endowments of the parish, and each such inventory shall specify—

(i) the name of the parish;

(ii) each property or security forming part of the said STATUTORY PROPERTIES AND ENDOWMENTS; and

(iii) the name or names of the person or persons in whom the same is vested;

General Trustees may require transfer at their expense.

(c) Without prejudice to the provisions of the immediately following paragraph of this sub-section any person in whom any property or security specified in any such inventory is vested shall if so required by the General Trustees, and at their expense, transfer such property or security to the General Trustees, and do and concur in doing all acts and things necessary for that purpose;

Inventory, so far as relating to heritable properties, may be recorded; and when recorded to be sufficient title.

(d) Upon any such inventory in so far as the same relates to heritable properties or securities being recorded in the appropriate register of sasines THE HERITABLE PROPERTIES AND SECURITIES specified in such inventory shall by virtue of this Act and without the necessity of any further con-

veyance be deemed and taken to be validly transferred to and vested in the General Trustees as if a disposition or assignation by the person or persons in whom the said heritable properties or securities were vested had been granted in favour of the General Trustees and had been recorded in the appropriate register of sasines;

- (e) (i) The Clerk of Teinds shall make available to the General Trustees, so far as may be necessary for the purposes of this section, all or any title deeds, certificates, or other documents which are in his custody as keeper of the records of the Court of Teinds relating to any properties or securities specified in any such inventory; Clerk of Teinds to make available to General Trustees title deeds, &c.
- (ii) Upon the completion of the transfer of any such properties and securities to the General Trustees the Clerk of Teinds shall hand over to the General Trustees any title deeds, certificates, or other documents relating to the same which are in his custody as aforesaid upon a receipt therefor being given by the General Trustees; On completion of transfer, the Clerk of Teinds to hand over title deeds, &c., to General Trustees.
- (f) The General Assembly, or any body to which the General Assembly may delegate the necessary power, may at any time after the completion of the transfer to the General Trustees of the properties and securities specified in any such inventory alter the existing deed of constitution of the parish to which the inventory relates, or annul the said deed and grant a new deed of constitution in place thereof; After transfer the General Assembly, &c., may alter constitution, or annul same and grant new constitution.
- (g) THE STATUTORY PROPERTIES AND ENDOWMENTS of the parish transferred to the General Trustees under or by virtue or in pursuance of this sub-section shall, notwithstanding Saving of existing Trusts.

anything elsewhere in this Act contained, be held by the General Trustees for the same ends, uses, and purposes as those for which they were held by the trustees or other persons in whom they were vested prior to their being so transferred.

Provisions as to new parishes.

The corresponding provisions applicable in the case of parishes *quoad sacra* which may be erected after the passing of the Act (28th May, 1925) are contained in sub-sec. (2) of sec. 34, and are in the following terms:—

In the case of a parish erected after the passing of this Act—

Titles to be taken to General Trustees.

(a) the titles, deeds, certificates, and other documents of or relating to THE STATUTORY PROPERTIES AND ENDOWMENTS of the parish shall be taken in the name of the General Trustees;

Powers of alteration, &c., of original constitution.

(b) the original deed of constitution shall be in such terms as the General Assembly, or any body to which the General Assembly may delegate the necessary power, may direct, and the General Assembly or any such body may subsequently alter the said deed or annul the same and grant a new deed of constitution in place thereof.

The provisions of the remaining sub-sections of sec. 34 are applicable to the case of all parishes *quoad sacra*, irrespective of the date of erection. They are these—

Saving of endowments secured from teinds (sub-sec. (3)).

Sub-sec. (3). Nothing in this section shall apply to any permanent endowment secured from teinds under section thirteen of the New Parishes (Scotland) Act, 1844:

Interpretation of terms (sub-sec. (4)).

Sub-sec. (4). In this section—

“Statutory properties and endowments.”

the expression “THE STATUTORY PROPERTIES AND ENDOWMENTS OF THE PARISH” means—

(i) THE CHURCH ERECTED AS A PARISH CHURCH for the parish under the

aforesaid Acts of 1844, 1868, and 1876; and

(ii) where a manse or glebe has been permanently provided under the said Acts as part of the endowment of the minister of the parish, such manse or glebe; and

(iii) any feu-duties, ground annuals, bonds of annual rent, or other heritable securities permanently provided and secured at the time of erection or subsequently substituted with the sanction of the Court of Teinds for the minister of the parish or for the maintenance of the church or manse or payment of the feu-duty thereon; and

(iv) any Government securities or other securities or investments (not being heritable securities) permanently provided and secured or substituted as aforesaid;

the expression "CHURCH" includes THE FABRIC "Church." AND SITE OF THE CHURCH AND HALL (if any) and any ground used as a burial ground in connection therewith;

the expression "manse" includes the dwelling- "Manse." house and offices and appurtenances thereof.

In sec. 35 provision is made for the allocation and redemption of sums contained in bonds and dispositions in security, &c., over land in favour of the minister or trustees of a parish *quoad sacra*, or of the General Trustees as coming in his or their place. Such bonds may sometimes be in security of provisions for maintenance of the statutory properties, but they are more usually to secure stipend. The text of the clause (the provisions of which are somewhat technical) will be found in the Appendix.

Further provisions applicable to all parishes *quoad sacra*.

There remain to be noticed certain provisions which are applicable to the case of all parishes of whatever kind.

Provisions generally applicable for protection, &c., of churches of nature of historical monuments.

Among the powers given in sec. 21 to the Commissioners there are comprised powers, after such inquiry as they may think fit, to make such orders as they may consider necessary or proper, under, *inter alia*,

Sub-sec. (h) for the protection and preservation OF ANY CHURCH OR OTHER ECCLESIASTICAL BUILDING which is for the time being used for ecclesiastical purposes, and which the Commissioners may, upon application made to them by the Royal Commission on Historic Monuments in Scotland or any person interested, consider to require special provisions in the public interest with respect to maintenance and access;¹² and

For transfer to kirk-session of communion plates, &c.

Sub-sec. (j) for the transfer to a kirk-session of communion plate or other ecclesiastical furnishings IN USE IN A CHURCH or by a congregation in any case in which a right of property in the plate or other furnishings is claimed BY ANY PUBLIC BODY.

As such plate and furnishings do not fall within the definition of "the statutory properties" in sec. 34 (4), it would seem that this power may be exercised, notwithstanding that section, by the Commissioners in the case of a parish *quoad sacra*, unless, indeed, it may be, where such plate and furnishings form the subject of a special trust.

Provision for securing appropriation of property in so far as necessary for proper requirements of the parish, and *quoad ultra* placing it at the disposal of the General Assembly.

In sec. 36 of the Act there is contained an important provision for securing on the one hand that property (including, *inter alia*, ANY CHURCH) which is transferred to the General Trustees by virtue of the Act, or the proceeds thereof, shall be appropriated in the first place for meeting the proper requirements of the parish and neighbourhood, and, on the other hand, that any remainder after these requirements

¹² In Scheme No. 7 (Edinburgh Burgh Churches) there is an instance of the exercise of this power in relation to St. Giles' Church.

have been fully met shall form a part of a general fund at the disposal of the General Assembly. The section is in the following terms:—

36. All moneys received by the General Trustees with respect to any parish under or in pursuance of the provisions of this Act relating to stipend AND ANY CHURCH, manse, glebe or other property heritable or moveable situated in, or forming part of, the endowments of any parish transferred to, or received by, the General Trustees by or in pursuance of this Act, and THE PROCEEDS of any such moneys, property, or endowments shall be appropriated in the first place to meeting the proper requirements of that parish or its neighbourhood (as such requirements may be determined by the General Assembly or by any body to which the General Assembly may delegate the necessary power), and any remainder after these requirements have been fully met shall form part of a general fund at the disposal of the General Assembly. Suitable protection is made for preserving interests of existing incumbents. These mainly relate to stipend. The text of the provision will be found in Appendix I.

In its application to the case of property transferred in the case of a parish *quoad sacra* erected before the passing of the Act, this section will fall to be read subject to the limitation contained in sec. 34 (1) (g), quoted *supra*, p. 169.

In the section of the Property and Endowments Act dealing with the transference to parish councils of CHURCHYARDS hitherto vested in heritors (or kirk-sessions) provision is made for adequately securing interests in any churchyard so transferred by or in pursuance of the Act which surrounds or adjoins any CHURCH OR OTHER ECCLESIASTICAL BUILDING vested in the heritors or in the General Trustees or in any other body holding the same in trust for the purpose of worship or for preservation as an ancient or historical

Churchyards surrounding or adjoining any church, &c., held in trust for the purpose of worship or preservation as an ancient or historical monument.

monument. With regard to such churchyards, sec. 32 (1) provides as follows:—

Restrictions
on use of
churchyards
in interests
of the church.

- (a) the churchyard, shall be held subject to a right of access to the minister and the congregation attending the church, and such other persons as may resort thereto for the purpose of public or private worship, or of inspecting or repairing the church, or for any other lawful purpose; and
- (b) no funeral shall be allowed to take place during the usual time of the ordinary services in the church; and
- (c) any road or path through the burial ground shall be kept in good and sufficient repair by the parish council; and
- (d) where the use of part of the churchyard is required for the enlargement or repair of the church it may be so used in any case where it might lawfully have been so used if this Act had not been passed and subject to the like conditions and restrictions, and where used for the purpose of the enlargement of the church the part so used shall thereupon vest in the heritors or the General Trustees or other body holding the church as aforesaid.

Note.—Although this chapter is concerned only with the provisions relating to the CHURCH, it has been found expedient, in order to avoid extensive repetition, where in the Act provisions as to the CHURCH AND MANSE occur in close association, to include the words relating to the latter, and to refer back when treating of the *manse* to the sections as printed in this chapter. Conversely, certain statements in the chapter on MANSES (Chap. VIII.) may usefully be referred to in supplement to this chapter.

CHAPTER V.

ORNAMENTA OF THE CHURCH.

SECTION I. CONSUETUDINARY LAW.

THE scope of this chapter is to give a short exposition of the history and customary rules regarding the articles which, according to Presbyterian usage, form the necessary equipment and furniture of a Scottish church, and which are technically described as *ornamenta*. “The word ‘ornaments’ but imperfectly represents the sense of the term ‘*ornamenta*,’ which includes the necessary equipment and furniture of a church, whether this be of a decorative character or not.”¹

Historical
summary.

Ornamenta
defined.

The worship of God may indeed be conducted without *ornamenta* of any kind; and none are prescribed as essential in the books of the New Testament. Since, however, worship is commonly conducted within the walls of a building, it has become in the course of the centuries matter of importance to determine what *ornamenta* best contribute to the reverent character of the services, due regard being had to the tenets and traditions of the particular branch of the Christian Church concerned.

In this connection it is well always to bear in mind that the modes of worship in the Christian Church have undergone many changes, and that the customary usages of the primitive Church of Italy, or of the Church in Gaul and Western Europe, or even of the German Church of the Reformation—while from all of them we may learn something as to the development of the various *ornamenta*—are not necessarily those by which we in Scotland are to be guided. Though there can be

Importance
of particular
ornamenta
varies with
usage of
different
branches of
the Church
Catholic.

¹ Bishop Dowden, “Proceedings of the Society of Antiquaries of Scotland,” vol. ix., 3rd series, p. 287.

but one Catholic Church, there may be infinite variety in its services, and therefore in the equipment of the ecclesiastical edifices of different nations, and even of different branches of the Christian Church within any particular nation.

In considering the significance of and the weight to be attached to the usages in regard to *ornamenta* accepted in any particular church at any given time much light is indeed to be derived from a study of their origins and historical development in the primitive Church and throughout the ages. But such study belongs to the province of the historian or the antiquarian rather than to that of the lawyer; and only in cursory summary is it at all appropriate to the present work.

Ornamenta in relation to principal features of Presbyterian worship.

In the Presbyterian Church of to-day we have as the distinctive features of our worship weekly—

- (a) Public prayer;
- (b) Public reading of the Scriptures; and
- (c) Public praise;

and occasionally the celebration of the two sacraments of

- (1) Baptism, and
- (2) Holy Communion.

It is with the *ornamenta* necessary or suitable for the fit and reverential worship of God by means of these services that we have here to do. With ecclesiastical architecture in its exterior aspects we are not now concerned.

Development of the Church edifice in the Primitive Church.

For some time after Christ's ascension divine worship was conducted in upper chambers and other private places; and a Roman mansion with its large private rooms would form an excellent place of worship. We have no Christian edifice surviving from before the time of Constantine. But so sudden and marked was the development of churches and Christian art thereafter that we have reasonable grounds for thinking that the new churches must have been very

largely modelled after the fashion of churches which were destroyed during the great persecutions. And while we have no buildings to tell us how the early Christians worshipped, we have clear testimony in the writings of such writers as Pliny the Younger in his "Report to Trajan" as to the simplicity of the service of the Christians; in those of Justin Martyr, who wrote before the end of the first half of the second century; and in the "*Didascalia Apostolorum*."

From these we gather an impression of organised service in which there were recognised three definite positions—those of (a) the president, (b) the *lector*, and (c) the faithful. The *lector's* appointed passages being finished, the president delivered a sermon from his own seat; and then all rose to pray. Then followed Holy Communion, partaken of by those present; and consecrated bread and wine were sent to the absent brethren. There was also a collection taken for the poor.

It is clear from these records that the congregations were seated. For we are told that "they rise" to prayer. And the regularity of the celebration of the Holy Supper suggests that there must have been a table as a necessary part of the equipment, and vessels for the bread and wine. We have therefore already in origin the following *ornamenta*, viz., (a) and its usual furnishings. seats for the presbyter or bishop, the elders, and deacons; (b) seats for the faithful; (c) a table for the Holy Sacrament; and (d) necessary vessels for the elements of Communion. Of the general accuracy of these conclusions we have important corroborative evidence in the Roman Catacombs—in their structural details, and in wall paintings. In one of the latter there can be dimly descried upon the table a simple mug with two handles, which is highly interesting as an illustration of the practical style of the chalice used in the catacombs in what was evidently a celebration of the Holy Eucharist. In chapels of the third and immediately

succeeding centuries we find traces of developments incidental to the increasing number of worshippers who desired to partake of Holy Communion at the very tombs of the hallowed dead. We have the apse, and the apsidal arch with the bishop's chair in the centre and the presbyters' benches on either side, the presbytery being separated from the nave by the pillars of the arch. In some instances there is in the apse a tomb, the stone lid of which probably served as the table, and beside which the president sat. The arrangement of these chapels seems to indicate that the custom of celebration of Holy Communion was already established substantially as at present. In the dark days of persecution the hope of immortality which lay at the very root of the Christian faith endeared to its persecuted votaries the practice of receiving the Holy Eucharist at the tomb of a sainted disciple. And when, after the Edict of Milan in 313, the Christian Church emerged into the serener atmosphere of permanent freedom and Imperial favour, the pious still regarded it as important to have buildings in which their services were conducted closely associated with the resting-place of a martyr—a circumstance which, as we shall see, affected the form of the table.

But freedom brought new problems which had their effect on the *ornamenta*. Increasing numbers of worshippers demanded great buildings for assembly—buildings in which the bishop's voice could not reach the people when he sat in his *cathedra* behind the table. The Communion was still freely celebrated as formerly. But as all who now attended service were not necessarily Christians, the actual consecration of the bread and wine came to be treated as a holy mystery to be concealed from the people. The singing could no longer be trusted to the chance of the occasion, and choral provision for it came into vogue. All these circumstances tended to multiplication of the technical furniture of the services—of the *ornamenta*.

Such are the guides which we have to the origins of the *ornamenta* of the Church. Without examining in further detail the historical evolution of them as a whole, we now go on to consider the individual items still in use in our Church, tracing the course of development in our own and neighbouring countries only in so far as it seems to illustrate how they came to be received in the Church of Scotland in their present form.

In the Basilican Churches of Rome, and in early Anglo-Saxon Churches, the high altar almost always rose out of the middle pavement, quite by itself and far apart from the wall. This corresponds, too, with the ancient Celtic usage as described by the Rev. David MacGregor in the "Lee Lecture," 1895, where he says—"The Eastern side of the altar was reckoned its front, and there the priest stood during the service. That he *faced* the people is proved by the many incidents in which the people are described as watching the play of emotion on the faces of the saints while praying at the altar in the Eucharistic service."³

Relation of
high altar.
Communion
table.

Until the Reformation "God's board" (as it is called in King Edward VI.'s Prayer-Book) was invariably described as an altar; from the tenth century its usual place was against the eastern wall, and the priest stood facing it, *i.e.*, with his back to the people. It early became one of the distinctive reforms that the Communion should be celebrated by such "a gathering

Pre-Reforma-
tion and early
Reformed
usage.

³ "The position of the celebrant was before the altar (*ante altare*), that is to say, facing the altar, and with his back to the congregation. This we infer from the expression, *de vertice*, in Cuminus' description of the four brothers watching St. Columba celebrate at Iona, and seeing a strange light streaming down upon his head" (Warren's "The Liturgy and Ritual of the Celtic Church"). The discrepancy is more apparent than real. If the church was in the form of a basilica, as the celebrant stood behind the altar (see Dr. Rock's "Church of our Fathers") the people might watch the play of emotion on his face. If it was not a basilica, he very probably stood with his back to the people. The Pope when celebrating High Mass stands behind the altar. This is because he celebrates invariably in a basilica. The custom is strictly a personal or official survival in so far as no priest but the Pope celebrates at the high altar of a basilica. All other priests of the Roman Communion celebrate in a basilica at a side altar standing, as elsewhere, before the altar.

round a table ” as would recall the Last Supper and the practice of the primitive Church. What this was has been already indicated.

Knox on
practice as
known to
him.

John Knox in his Confession, or “ Vindication of the Doctrine that the Mass is Idolatry,” delivered at Newcastle on 4th April, 1550, after drawing various distinctions between the Mass and the Lord’s Supper, says—

“ In the Lord’s Supper all sit at ane table; no difference in habit nor vestment between the minister and the congregation. In the Papistical Mass the priests are placed by themselves at ane altar (as they call it); and are clad in disagysit garments ” (Works, vol. iii., 1854 edition, p. 66).

Knox at this time had not been on the Continent except as a French prisoner; he must be describing the usage of the English reformers, because the Reformation had not as yet taken form in Scotland.

Practice in
England.

In England the first prayer-book in the vulgar tongue appeared in March, 1549. The Communion service is headed, “ The Supper of the Lord and the Holy Communion, commonly called the Mass.” After the psalm for the day had been sung—

“ The priest, *standing humbly afore the midst of the altar*, shall say the Lord’s Prayer, with this collect.”

Shortly afterwards the direction occurs—

“ Then the priest, *standing at God’s board*, shall begin—

“ ‘ Glory be to God on high ! ’ ”

After the offertory—

“ Then so many as shall be partakers of the Holy Communion shall tarry in the Quire, or in some convenient place nigh the Quire, the men on the one side and the women on the other side.”

The words “ altar ” and “ God’s board ” are used indifferently, but not “ table.”

The first prayer-book of Edward VI. was not long in use, for in 1552 the new prayer-book, in the preparation of which Knox took part, appeared. In it the

word "table" is substituted for altar (in the marriage service the term "Lord's Table" is used). The rubric sets forth—

"The table at the Communion time having a fair white linen cloth upon it, shall stand in the body of the church or in the chancel, where morning and evening prayer are appointed to be said. And the priest, standing at the north side of the table, shall say the Lord's Prayer, with this collect following."⁴

This rubric appears unaltered in Queen Elizabeth's Prayer-Book, and stands in the prayer-book of the Church of England to the present day, although in the reign of Charles I. the practice of moving the table on Communion days was given up.⁵

Lord Chancellor Cairns, in giving judgment in *Ridsdale v. Clifton*, 1877, L.R., 2 P.D. 276, at p. 339, observed—

"The rule by which the position of the minister during the celebration of the Holy Communion is to be determined must be found in the rubrical directions of the Communion office in the prayer-book, there being, as to this matter, nothing in any statute to control or supplement those directions. In examining these directions their lordships propose to put aside the argument, very much pressed upon them, that the proper, and only proper, position for the Communion table is in the body of the church, or in the middle of the chancel, and that it is in a wrong position when placed at the time of the Communion service along the east wall. They think this argument has no sufficient foundation. No charge is made that in the church of the appellant the Communion table stood where it ought not

⁴"The term 'Communion Table' is not to be found in the prayer-book, the table being invariably viewed as the Table of the Lord, and not of the communicants" (Blunt's "Annotated Book of Common Prayer").

⁵That the administration of the Holy Sacrament did not take place at the chancel steps is, "as in the case of so many other parish records, shown by an extract from the meeting minutes (Appendix D, p. 585)—'The Churchwardens shall take order,' i.e., at the general Communion at Easter, 'where the pews be long, to have every second pew left empty for the Minister to come the more conveniently.' The communicants too, had 'tokens' as in the Presbyterian Churches of Scotland" (Athenæum, Jan. 25, 1902 (No. 3874), p. 108—"Review of St. Martin's-in-the-Fields": "The Accounts of the Church Wardens, 1525-1603." Transcribed and edited by John V. Kitto (Simpkin, Marshall & Co.).

to have stood, and, in the opinion of their lordships, no such charge could have been sustained. The rubric, indeed, contemplates that the table may be removed at the time of the Holy Communion, but it does not in terms require it to be removed. Morning and evening prayers are, according to one of the early rubrics of the prayer-books, to be used in the accustomed place of the church, chapel, or chancel. In churches where it is customary to use both the chancel and the body of the church, or the chancel alone, for morning and evening prayer, the direction that the table shall stand 'where morning and evening prayer are appointed to be said,' is satisfied without moving it. That direction cannot be supposed to mean that the position of the table is to be determined by that of the minister's reading-desk or stall only, the service being 'used' and 'said' by the congregation as to the part in it assigned to them, as well as by the minister. The practice as to moving or not moving the table has varied at different times. It was generally, if not always, moved in the earlier part of the post-Reformation period. When the reversion of 1662 took place, and when the present rubric before the prayer of consecration was for the first time introduced, it had come to be the case that the table was very seldom removed. The instances in which it has been removed may be supposed from that time to have become still more rare, and there are now few churches in the kingdom in which, without a structural rearrangement, the table could be conveniently removed into the body of the church. The utmost that can be said is, that the rubrics are to be construed so as to meet either hypothesis."⁶

Post-
Reformation
practice in
Scotland.

As regards Scotland, in 1557 the Lords of the Congregation ordered the second prayer-book of Edward VI. to be used. In 1562 the General Assembly by Act directed the sacraments to be celebrated according to the "use of Geneva." This was the order of worship drawn up by John Knox for his congregation at Frankfort, and printed for the use of his congregation at Geneva in 1556. Between 1562 and 1564 it was enlarged, and the remodelled version of the Book of Geneva is what is known as Knox's Liturgy or Book of Common Order. "It embodies the law of the

⁶ See also "How the Communion Tables were set Altar-wise: a story of Excommunication," by Professor Sayce (*Contemporary Review*, vol. lxxiv., p. 270).

Church as to worship, from 1564 to 1645" (Sprott and Leishman's edition of "Book of Common Order," 1868, 1564-1645. p. 15).

The only rubric in Knox's Liturgy bearing upon the position of the table is—

"The exhortation ended, the minister cometh down from the pulpit and sitteth at the table, every man and woman likewise taking their place as occasion best serveth."⁷

In 1871 Dr. Sprott printed for the first time the draft of a liturgy for Scotland, which was completed in the reign of James I., and sent up to London in 1629, if not earlier, only to be rejected by Charles I. and his advisers. It is in the British Museum. Part of the rubric of the Holy Communion service is—

"The table whereat the Communion is to be received being covered with a white linnen cloath shall stand in that part of the church which the minister findeth most convenient, and as soone as the minister enters into the pulpit, such as attend upon the ministration shall present the elements covered, and set them upon the table. . . . After sermon is ended the minister shall come doune from the pulpit to the table, and standing at the syde thereof shall use the short prayer, saying" (p. 66).⁸

In Laud's Scottish Prayer-Book of 1637 the rubric stood thus—

"The holy Table having at the Communion time a Carpet, and a fair white linen cloth upon it, with other decent furniture meet for the high mysteries there to be celebrated, shall stand at the uppermost part of the Chancel or Church, where the Presbyter standing at the north side or end thereof, shall say the Lord's Prayer," &c.

⁷ "The absence of pews often admitted of several tables being set up side by side with that at which the elements were consecrated and first received" ("The Ritual of the Church," by Rev. Thos. Leishman, D.D., in "The Church of Scotland, Past and Present" (1891), vol. v.).

⁸ The direction that the elements are to be brought forward when the minister "enters into the pulpit," as given in the MS., was probably in conformity with the practice at that time, though for a long period the custom has been to bring in the elements after the sermon, at the commencement of the Communion service proper. The rubric directs the minister to stand at the side of the table. This is, of course, to be understood of the side farthest from the people, and as equivalent to *behind the table*, with his face towards them ("Scottish Liturgies of the Reign of James VI.").

Westminster
Directory,
1645.

The Westminster Directory, under the heading of "The Celebration of the Communion or Sacrament of the Lord's Supper," sets forth that after the "exhortation"—

"The table being before decently covered, and so conveniently placed that the communicants may orderly sit *about it, or at it*, the minister is to begin the action with sanctifying and blessing the elements of bread and wine set before him (the bread in comely and convenient vessels, so prepared, that, being broken by him and given, it may be distributed amongst the communicants; the wine also in large cups), having first, in a few words, showed that those elements, otherwise common, are now set apart and sanctified to this holy use by the word of institution and prayer."⁹

On this passage Dr. Leishman observes—"The most obstinate contest was over the words 'sit about it or at it.' The customs of England and Scotland were here altogether at variance. Hitherto in England the ordinary usage had been to sacrate the elements at a small table so placed in the church that all might see and hear. From this they were taken by the minister and given to the communicants in their pews. The older fashion of having the holy table at the eastern wall and bringing the people to the rails had hardly been renewed when the same troubles began. The Scottish table, on the other hand, was intended for the communicants as well as for the elements. It was made as long as the size of the church would allow, the people sitting along both sides."¹⁰

⁹ We learn from Lightfoot that "there was some question about the minister's coming to the table." The MSS. Record also mentions a debate about "the minister's still keeping his place at the table" after the consecration, where the words are now simply "being at the table." As some of the extreme Independents preferred to consecrate in the pulpit, it is likely that these objections caused the one passage to be struck out, and the other to be altered so as to allow of the minister's remaining longer in the pulpit, came from that side of the Assembly. The following were the original words of the Directory in this place:—"The other officers attending that service, the minister is to begin the action with the sanctification of the elements of bread and wine set before him, the bread in platters." The clause about the officers of the church was admitted in June, but was erased at some later stage [9 Dr. Sprott, *ut supra*.]

¹⁰ "The Westminster Directory," edited by Thomas Leishman, D.D. Church Service Society, 1901, pp. 120-121.

The Act of the General Assembly of February 3, 1645, establishing and putting into execution the Directory, contains the following special declaration:—"Provided always that the clause in the Directory 'Of the Administration of the Lord's Supper' which mentions the communicants sitting 'about the table or at it' be not interpreted as if, in the judgment of this kirk, it were indifferent and free for any of the communicants not to come to, and receive at, the table; or as if it did approve the distributing of the elements by the minister to each communicant, and not by the communicants themselves." The Act came gradually into general use, *e.g.*, "July 9, 1645. The Directorie sent over from Edinburgh with the Acts of the last General Assemblie is appoynted to be practised by all the brethren in all the kirks within the presbyterie, and to begin upon Sunday come fiftein dayes" ("The Presbyterie Book of Kirkcaldie," edited by the Rev. W. Stevenson, 1900, p. 288). But no Act formally laid aside the earlier orders.

Walter Steuart of Pardovan wrote—

Pardovan.

"Upon the day of the Communion, a large table being so placed as the communicants may best sit, and the congregation may both see and hear, the publick worship is begun as on other Sabbaths. And immediately after sermon the minister prays and sings a part of some psalm, then, having had an exhortation, he desires the elders and deacons to bring forward the elements, while he cometh from the pulpit, and *sitteth down* at the table."¹¹

Episcopalians and Presbyterians alike in the beginning of the eighteenth century "sat on the forms at the long table, the elements being handed round from person to person" (Graham, "Social Life of

Transition to modern practice.

¹¹ "It is the singular privilege of the Pope, when he performs the office of consecration, to communicate *sitting*" (Shepherd, "Critical and Practical Elucidation of the Book of Common Prayer," vol. ii., 219). The writer has not been able to find corroboration of this statement, but it is believed that it either does, or did, record a fact indicative of the adherence to primitive usage, which is often found embedded in the kernel of Roman ceremonial.

Scotland in the Eighteenth Century," 1899, ii., p. 13). According to Dr. Leishman, it was Dr. Chalmers who took the lead in breaking in upon the honoured custom in the Church of Scotland, when in 1819 he took possession of his new Church of St. John's in Glasgow. The same was done afterwards in the Tron Church there, which he had just left. Some local agitation followed. At last the innovation was challenged by the older Dr. Begg, who by an overture from his Presbytery procured a declaration from the Assembly "That it is the law and has been the immemorial practice of the Church of Scotland to dispense the Sacrament of the Lord's Supper to the people seated at or around a Communion table or tables"; and an injunction that they should be provided for in the rebuilding or reseating of churches (Act 1828, p. 34). In 1837 attempts to enforce this decision were petitioned against by several members of the Glasgow Presbytery, among others by the Rev. Patrick MacFarlane, who had been Dr. Chalmers' immediate successor in St. John's. The Assembly repeated their deliverance, but with a dispensation in favour of those churches in which the irregularity had been sanctioned. The usual result of such *ex post facto* sanctions followed; and "now the old Scottish Communion tables are hardly to be seen" ("The Westminster Directory," *supra*, 1901, pp. 38, 39).

Modern
practice.

I. The holy
table.

In modern times, for good or ill, the use of a long table having been abandoned,¹² A HOLY TABLE of limited size is used for the consecration of the elements, AND SHOULD FORM PART OF THE PERMANENT FURNITURE OF EVERY SCOTCH CHURCH. A stone table is illegal in the Church of England, nor does a wooden table with

¹² "The first parish church of which I was minister had no Communion table. On the Communion Sunday a temporary board was fixed in front of the precentor's desk. My present parish church (Auchtertool), when I went to it twelve years ago, had a number of Communion tables, and these on the occasion of Communion were placed end to end and reached from the top of the kirk to the bottom" (Rev. Wm. Stevenson, Church Law Society Reports, 1904, p. 12).

a stone top comply with the law¹³; in Scotland there is no prohibition of stone, and if the *mensa* is covered with a "fair white linen cloth" a stone table may not be objectionable. If we appeal to primitive usage we find that wood and stone were alike used for altars until about the fifth century—except in the catacombs, where the tomb formed the table in most cases, if not all. But, whether of stone or wood, the table was a *table* until the sixth century, when, instead of placing altars *above* the tombs of martyrs, the custom developed of transporting their remains or portions of them to the altar, which in time became virtually a *stone chest*. On the whole, a wooden table seems to be more consistent with the usage of the Church of Scotland.

At such services as marriage, admission of young communicants, setting apart of deaconesses, and the like, the minister is in use to stand before the table. There should therefore be a space of sufficient width (say, at least, 18 inches) available in front of it.

On Communion Sundays the bookboards of the pews, or of a sufficient number of them to accommodate the members of the congregation who are expected to communicate, are usually covered with narrow white cloths. It is not impossible that these white cloths are a survival of the pre-Reformation "houseling cloth"—"a long linen cloth held by clerks in front of the communicants when receiving the Sacrament, or sometimes laid upon a bench at which they knelt. In some cases it

Use of white
cloth cover-
ing of pews at
Communion.

¹³ It may be noted that while in England since the Restoration the general custom has been to revert to Laud's practice of keeping the table permanently against the eastern wall, the custom has had numerous local exceptions, particularly in the Channel Islands. In Scotland there are exceptional instances where the table stands against the wall, but the practice is to move it forward when Holy Communion is celebrated, so that the minister may stand behind it. Again, while the custom of communicants remaining in their seats is sometimes supposed to be Scotch, it was far from unusual in England—e.g., at Christ Church, Oxford, up to 1856 it was the custom for the communicants to remain in their seats while the officiants walked round to communicate each. "Dr. Pusey frequently communicated in this way" (Church Folk-Lore, 1894, p. 62).

seems to have been long enough to reach all across the nave and aisles of the church. In a manner it took the place of the altar rail of modern times, though the Communion was not necessarily given at an altar." (The rail was not used in England until early in the eighteenth century.) "The houseling cloth was ordinarily of linen, but on State occasions it was sometimes of silk. Its use continued till long after the Reformation, and is not even yet quite extinct (J. T. Micklethwaite, F.S.A., "The Ornaments of the Rubric" (Alcuin Club Tracts), 1898, p. 39).

II. Baptism. The font.

According to the Directory of 1645, baptism is not to be administered "in private places or privately, but in the place of public worship, and in the face of the congregation, where the people may most conveniently see and hear, and not in the places where fonts, in the time of popery, were unfitly and superstitiously placed." Where were *fonts* placed "in the time of popery"? When baptism ceased to be given in river or stream, it became the custom to erect baptisteries, *i.e.*, special buildings, with a deep basin into which the person to be baptised descended, and received his baptism standing by dipping. They were frequently—perhaps more often than not—round buildings, resembling Roman mausoleums or the rooms used by the Romans as baths; and some baptisteries had actually been mausoleums. The pool was usually made octagonal in shape.

This remained the custom of the Church for many centuries—in Italy, indeed, through the whole of the Middle Ages. In Germany, however, about the beginning of the ninth century (Lubke, "Ecclesiastical Art in Germany in the Middle Ages"), the custom arose of erecting a font in the church, and thus saving the erection of a special baptistery. In the plan of St. Gallen, which belongs to the beginning of the ninth century, the font is placed in the middle of the nave, "close to the western choir, and to the east of it; it is dedicated to John." Early church fonts were shaped like a

barrel. The person about to be baptised stood up to his hips in water, and the priest poured water on his head; in 1124 seven thousand Pomeranians received baptism at Peysitz in a few days, standing in barrels temporarily sunk into the ground. A bas-relief on the font at Pont-à-Mousson (of the eleventh or twelfth century) represents the baptism of two catechumens, who are shown standing in a barrel placed on a pavement (De Caumont, p. 307). As the custom of sprinkling (*infusio*) superseded dipping (*immersio*) such large vessels were not required,¹⁴ and the beautiful ornamental fonts of the Middle Ages were erected. Lubke says—"The usual place for the font is, at the present day, at the western end of the north side aisle; it is only the Protestant worship which has generally removed the font from its old place, and placed it at the entrance to the choir." Pardovan observes—"The sacrament of baptism is to be administrate in the face of the congregation after sermon, and before pronouncing the blessing. The child to be baptised, after notice given to the minister the day before, is to be presented, the pastor remaining in the same place where he hath preached, and having water provided in a large basin." The modern usage of Scotland, however, directly points to the convenience of having a font.¹⁵ It may con-

Post-Reformation practice in Scotland.

¹⁴ "The practice of immersion, as against affusion, is proved by the large size of still surviving fonts, such as the font of sixth century workmanship found at St. Breacan's Bed, and another of twelfth century workmanship at Cashel, in the chapel of Cormac, King of South Munster (1123-38). Single immersion was the custom, in *tota diocesi Maxloviensi*, in Brittany up to A.D. 1620. It prevailed in the sixth century in Spain, where Gregory I. advised its retention under the peculiar circumstances in which the Spanish Church stood at that time with regard to Arianism, and where a British bishopric existed at that date. It is left optional in the three extant *Ordines Baptismi* of the ancient Gallican Church, while a rubric directing trine immersion is contained in the earliest *Ordines Romani*. Trine immersion with the alternative of aspersion is ordered in the earliest extant Irish baptismal office, in the composition of which, however, Roman influence is strongly marked" (Warren's "Liturgy and Ritual of the Celtic Church," 1891, p. 64, and authorities therein cited). In England there is a font for immersion in the parish church of Lambeth.

¹⁵ In England, by Canon 81 of 1603 it was provided—"There shall be a font of stone in every church and chapel where baptism is to be ministered; the same to be set in the ancient usual places." "This

veniently be placed at the entrance to the chancel to the south side, as the pulpit is placed to the north.

In his paper on "Church Fabrics, their right arrangement in relation to the various ordinances and services of worship," in vol. ii. of the second series of the Scottish Church Society Conferences, 1895, the Rev. E. L. Thompson, D.D., pleads for the erection of the font, if not at the principal door of the church, at least at the door of the transept. "In this way the ancient and beautiful symbolism of Baptism being the gate into the Church could be preserved, while the administration of the rite could at the same time be visible to the congregation.

"The Scottish Church is insistent on the publicity of baptism, but some consideration is to be exercised as to the way in which this requirement should be carried out. It is surely not desirable that the baptismal rite should be administered before the people in the sense of being done immediately in front of the Lord's table, or of the pulpit." The reasonable objection to erecting the font at the entrance to a church is that a baptism cannot be "in the face of the congregation," unless, indeed, the pews are sufficiently wide to allow of the congregation standing and turning round so as to look over the pew backs. It is, however, by no means a primitive usage to require baptism to be performed before a large congregation, as the limited size of the ancient baptisteries shows. There there was indeed room for candidates, sponsors, clergy, and friends; but none for a congregation. The font was screened off by curtains hung between pillars to secure the privacy of the candidates. But in this case, of course, the baptism was given to persons of full age; and the practice of infant baptism has made privacy of the administration of the Sacrament unnecessary.

means set at the entrance of churches, for the entrance into the Church is through the sacrament of Baptism" (Phillimore's "Ecclesiastical Law of the Church of England," 1895, vol. i., pp. 486, 487).

A valuable paper by Mr. J. Russel Walker, architect, on "Scottish Baptismal Fonts" will be found in the "Proceedings of the Society of Antiquaries of Scotland," 1886-87, p. 346. Speaking of Scottish mediæval fonts, he says—"Many of the bowls of the Scottish fonts are quite destitute of ornamentation. This is doubtless due in many cases to the poverty of the country, but in others it is just as certainly traceable to some superstition on the part of the inhabitants." A few pre-Reformation baptismal fonts have now been restored to use in Scottish parish churches. The moveable bowls for use instead of the font were of foreign Protestant origin.

The older French Protestant churches to the present day have no fonts; the baptismal water is brought in a silver bowl. The newer churches, which have the pulpit to the left of the table, have a font to the right of the table. In Germany the font is invariably placed in front of the altar, but outside the rails; baptism is seldom performed during Sunday divine service.

Continental
Protestant
usage.

Plain though the majority of Scottish churches are, there is nothing, as Dr. Sprott observes, in the Presbyterian system inconsistent with the noblest style of architecture, "nothing to prevent our utilising all the parts of a Gothic cathedral." "The parallelogram or simple nave, which is all we can look for in many parishes, is capable of being treated in a churchly way by devoting the east end to the pulpit, Communion table, &c." ("Worship and Offices of the Church of Scotland," pp. 234, 235). Dr. Rowand Anderson gives some excellent suggestions as to this in "The Divine Life in the Church" (Scottish Church Society Conferences, second series, vol. ii., at p. 235).

Internal
arrangement
of church.
Practical
suggestions.

Within recent years the PULPIT has been more and more restricted to its proper use as a preaching place. In the primitive Church the Bishop preached from his seat behind the altar. This in the first five centuries was often a solid armchair, with a high, rounded back carved out of a single block of marble; and he must

III. The
pulpit.

therefore have preached surrounded by his presbyters. No doubt the chair would be distinguished by its textile coverings, cushion, and stool. (Cf. Lowrie's "Christian Art," p. 173). But the practical inconvenience of addressing a large congregation from the inmost seat of the apse must have been great—the rather that, be it remembered, there were between him and the people the altar, with its lofty arched structure or *ciborium*, and the collonade which marked off the *Presbyterium*. It is conjectured that the famous ivory chair of Bishop Maximianus of Ravenna (546-556) was used as a portable *cathedra*, and placed near the front of the *Presbyterium*. Since it is sculptured behind as well as in front, it cannot have been intended to stand permanently against a wall. Even when placed near the front of the *Presbyterium*, however, its position was not all that could be desired by an orator who wished his words to be heard by a multitude. And so in time the preacher came to speak from one or other of the *ambons* or pulpits which stood flanking the *Presbyterium*.

Disadvantage
of central
position.

Those Presbyterian churches which still have the pulpit in the middle of the east wall in a sense reproduce the practice of the early age, particularly if the holy table is in front and there is a fairly large space around it, seated for minister and elders when celebrating the Holy Communion. But the larger the space is the further must the pulpit be thrown back; and the minister is faced with the old difficulty of being heard which troubled the preachers of the Early Church. As, therefore, the table and the space in which it stands should be the central feature of the church, the pulpit is best placed on the north side of the entrance to the chancel, or of the space in front of the holy table.

IV. Choir and
organ.

As regards the appropriate place for the choir and ORGAN, Dr. Rowand Anderson has emphatically written—"I am not prepared to specify the best place, because that will depend on the shape and extent of the auditorium, but I can specify the worst, and that is behind the pulpit, immediately in the face of the con-

gregation. Nothing can lower the religious sentiment of the building or the dignity of this part of the service so much as the placing of an organ, generally much too large for the work it has to do, in the position it would occupy in a music hall." The west gallery¹⁶ is the old place for the "people's choir and organ." Dr. Anderson would add to the furniture of the church a LECTERN from which the Bible may be read, and a PRAYER-DESK "slightly elevated," so that "the minister should kneel with, and at the head of, the people, as that is the position of every leader, whether he is facing the foe or Him to whom the common obeisance is offered."

By Act 1617, c. 6, each parish church in Scotland was required to be provided, before February, 1618, by the parochiners—here meaning heritors—with CUPS, TABLES, and TABLECLOTHS for the celebration of the Communion, as well as with BASINS and LAVOIRS for baptism. These are "to be received to that use by the minister of the parochin, in sick convenient place as he shall finde meet," and he, his heirs, and executors are made answerable for their loss or profanation (*Hamilton v. Minister of Cambuslang*, 1752, Mor. 10570).¹⁷

V. Sacramental vessels.

A question has been mooted as to the formal title of ownership in such *ornamenta* beneficially held for a parish *quoad sacra*. In the case of an old parish, the duty of providing them is by the Act of 1617 laid on the heritors. And as the heritors are formally proprietors of the church for the parishioners, so are

¹⁶ It is assumed that the church stands east and west. While orientation is a very ancient custom (see Dr. Rock's "Church of our Fathers," 1849, vol. i., p. 220), and has been practically the rule in the Church of England for fifteen centuries, such orientation is neither universal nor obligatory in that Church, and it has been almost systematically disregarded alike by the Presbyterian Church of Scotland and the Roman Catholic Church both in England and Scotland since the Reformation. Among Roman Catholic churches which in their avoidance of orientation follow Presbyterian usage are the Brompton Oratory, the pro-Cathedral in Glasgow, and the new Cathedral at Westminster. Orientation.

¹⁷ An instructive paper on sets of Scottish Church plate, by Norman M'Pherson, Esq., LL.D., formerly Sheriff of Dumfries and Galloway, will be found in the "Proceedings of the Society of Antiquaries," 1885-86, p. 398, with many illustrations.

they of the things provided by them as incidental to its services. And the Act provides for the custody of them. In the case of a parish *quoad sacra*, there are, of course, no heritors concerned. But the church which must be provided as a condition of erection is by statute vested in trustees. Presumably at the time of erection there will have been provided in the church those principal *ornamenta*, such as sittings, the pulpit, Communion table, and font, which are necessary for the conduct of services therein. And on principle these would seem to be accessories to the heritable subject, the church, in connection with which they are to be used—and so to be heritable *destinatione*. They would, therefore, as accessories naturally be vested, in the absence of anything said to the contrary, in the trustees in whom the principal subject is vested in trust. And there seems to be no reason for applying a different principle to the smaller articles such as Communion plate and the articles described in the Act of 1617, where these have been provided as accessories at the time of erection of the parish, or acquired and paid for out of seat rents under the powers given under sec. 9 of the New Parishes Act of 1844 (see *infra*) to apply seat rents towards the expenses necessary in dispensing the ordinances of religion in the church. In the case of gifts of such *ornamenta* otherwise to the church, the question of formal title would probably depend on the circumstances and terms of the particular gift. But *in dubio* the trustees would appear to be the natural representatives of the congregation who are the beneficial owners. Except as regards the responsibility for raising the necessary sum for maintenance, the question is largely academic; for there can be no doubt that the right of control of the administration of all that is incidental to the worship of the church must (as the Act of 1617 recognises) be with the minister. But it has a certain practical interest in view of the transfer to the General Trustees of the Church of the statutory properties and endowments of

all *quoad sacra* parishes from the local trustees in whom these have hitherto been vested, which is provided for by sec. 34 of the Property and Endowments Act of 1925. In the definition in sec. 34 (4) of "statutory property and endowments," there is no mention of *ornamenta*. So that the question of how far these will pass to the General Trustees by virtue of the transfer to them of "the church erected as a parish church"—which includes "the fabric and site of the church and hall (if any)" (sec. 34 (4))—must be determined on similar principles to those applicable to the right of the present local trustees to formal ownership of such subjects as are in question. Where any subjects are not clearly included in the statutory conveyance, it will probably be convenient for the present trustees to take steps to have them formally vested in the General Trustees, as it is obviously undesirable that local trustees should be kept merely as repositories of the formal title of subjects of which the substantial interest is in the congregation—which in regard to the more important items of equipment is represented by the General Trustees. There seems to be no ground in principle on which a kirk-session can claim to be vested with the title, unless such is to be found in the terms or circumstances of any particular gift. The special case in which any such plate or furnishings are claimed by a PUBLIC BODY may be dealt with by the Commissioners under the Act of 1925, who may by Order provide for transference thereof to a kirk-session. (See 1925 Act, sec. 21 (j).)

Mr. Micklethwaite, writing of the Church of Eng- VI. Pews.
land in the year 1548, says of PEWS—"Most churches had pews for the use of the people, though they were not crowded with them as became the custom at a later date. They generally occupied only the eastern part of the nave and of the aisles (when there were any), the passages between the blocks being very wide. When a church had chapels at the sides of the chancel they also were often filled with pews, arranged so that they might

be used by worshippers either at the high altar or at the altars of the respective chapels. Shut-up pews or *closets*, as they were called, were to be found in some churches. They were generally the enclosures about altars at which there had been chantries, and were used by the patrons of the chantries as private pews. This use continued after the suppression of the chantries."¹⁸

Pews were less necessary until the sermon became the important part of the service. At first portable stools, and then forms, came into use. In 1562-63 the Town Council of Peebles ordained the treasurer "to big settis in the Croce Kirk for eus of the parochiners"; and in 1611 they had a seat for their own special use. So, too, in Paisley, the Burgh Records bear, under date October 16, 1617, the following burgh Act:—"The quilk day it is stant and ordaint that nane of the Counsellors within the Burgh come to the Counsell nor enter in the town Dasse (*i.e.*, desk or pew) in the kirk without hattes, nor yet that nane persoune to enter in the said dasse in the kirke but those that are presentlie upon the Counsell or has bein thairupon of before" ("Charters and Documents relating to the Burgh of Paisley" (1163-1665), edited by Metcalfe, 1902, p. 286).¹⁹

Up to the middle of the seventeenth century there were few fixed seats or desks in churches in Scotland, and for a considerable time their erection was purely a matter of arrangement between persons who desired to provide fixed seats for themselves and the kirk-session, who originally had the power to allow or forbid such erections.

Not infrequently, however, an appeal was taken to the Presbytery. Many instances will be found in the "Presbyterie Book of Kirkcaldie," edited by Rev. W. Stevenson—*e.g.*, under date September 9, 1630. "The whilk day the brethren that wer sent commis-

¹⁸ "The Ornaments of the Rubric" (Alcuin Club Tracts), 1898, pp. 44, 45.

¹⁹ See more fully upon this subject, "The Faculty of Procurators in Glasgow and their Pew in the High Church," by David Murray, Esq., LL.D., in Regality Club papers, fourth series, part second, 1902.

sioners to Auchterdirran declared thair diligence in putting the decreitt of the Presbyterie to execution in all things as they wer appoyntit, and that they putt in ane pairt of John Sinclair's seatt in the rowme asignit to him be east the pulpitt whereby they gave him possession thairof as also putt in ane foorme in the rowme assigned to Mr. John Scrimgeor and so gave him possession thairof, and markit the rowm thairof upon the wall to be betwixt the widdest of the bowells upon the north wall and the pillar upon the east. As also markit the rowme for the Laird of Kyninmonth upon the wall that he should come no further west than the east syde of the windo neirest the durr," p. 18. At a meeting of the same parish on April 23, 1640, "Anent the placing of the kirk seates, the minister declairs that thair is ane submissioun subscrivit be the haill heritors to that effect. The Presbyterie desyres them to put the samyne submissioun to ane poynt betwixt this and Witsonday, other-ways they will doe it themselves" (*ibid.*, p. 173).

It is clear that pews must have been general by the time the Directory was adopted (1645), as the Article "Of the Assembling of the Congregation and their behaviour in the Publick Worship of God" observes, "Let all enter the Assembly not irreverently but in a grave and seemly manner, *taking their seats or places* without adoration or turning themselves towards one place or other."²⁰

²⁰ It would appear that when sittings were erected the heritor who put them up frequently sold or leased the pews. Thus under August 14, 1696, Cunningham of Craigends enters in his diary, "Order of seats in my father's life in the kirk as he left them," and on Oct. 24, 1707, "I saw two papers, dated 1674, granted by my father, one to Wm. How [one of the persons mentioned in the list], with 8 mks. 4s. 8d. received, and for that getting them their above written seats to them and to their airs, but with this provision—That my father and his airs have liberty to redeem them by repaying the foresaid sowms whenever they please. This clause is in both the papers. I saw another paper to James Young, dated Feb. 17, 1677, getting a seat to him for six pounds with power to redeem the seat on payment of the said six pounds" ("Cunningham's Diary," Scottish Record Society, 1887, p. 25). Cromwell Lockhart acquired the "dasek or sait wellum the laigh church of Lanark, laitylly pertaining to the lairds of Auchenglen," and thereafter dispoised the seat to Captain Samuel Lockhart "upon the

Pew rents.

A kirk-session had, in modern times, no concern (prior to the passing of the Church of Scotland (Property and Endowments) Act, 1925 (15 Geo. V. c. 33)),²¹ with pews or seat rents, at least in the case of old parishes (*Heritors of Falkland v. Minister and Kirk-Session*, 1739, Mor. 7916; *Edinburgh Ecclesiastical Commissioners v. Kirk-Session of the High Kirk*, July 18, 1888, 15 R. 952, per Lord Young at p. 961).

Extent of duty formerly resting on heritors for provision of pews.

In modern practice a church had to be provided by the heritors with pews (*M'Leod v. Carment* (Ross-keen), 1830, 8 Sh. 475). The breadth and depth approved by the leading cases was about 29 inches wide, with seats of about 18 inches in breadth (Connell on Par. Supplt., 72; *Harlaw v. Merchant Maiden Hospital* (Peterhead), 1802, 4 Paton, 356; *Hamilton v. Presbytery of Hamilton*, 1827, 6 S. 47). In the *Shettleston* case (see *supra*, p. 129) Sheriff Strachan directed that "at least 21 inches by 32 inches be allowed in the pews for each sitter in all parts of the church" (Interlocutor of August 12, 1899). This means that there is to be a space of 32 inches between one pew back and another, and that the actual seat will be 21 inches in breadth. Kneeling boards are frequently supplied in modern churches. The change in the position adopted in prayer should be allowed for in the pewing of modern churches. When the congregation stood at prayer, a narrower pew sufficed than now when the people are supposed to kneel and in reason, should have space to do so.

Distribution of sittings.

In the case of a *landward* parish the area of the church was divided among individual heritors (*Ure v. Ramsay* (Tillicoultry), 1828, 6 S. 616, at pp. 917, 918).

Where the parish was *burghal-landward* the area was divided, and the sittings in each portion allocated among the respective heritors of the landward and of the

consideratione of the kyndnes the said Captain Samuel Lockhart had signallie witnessed to the said Cromwell Lockhart," April 21, 1681 ("Lanark Burgh Records," 1893, p. 204). The fixed pewing of the Church seems only to have been resolved upon on November 23, 1717 (*ibid.*; p. 297).

²¹ See *infra*.

burghal portions of the parish (*Harlaw v. Merchant Maiden Hospital* (Peterhead), 1802, 4 Paton, 356), the latter being represented by the magistrates, who themselves allocated their share among the burghal community. (See *Sinclair v. Heritors of Kinghorn*, 1761, Mor. 7918; *Lockhart v. Lockhart* (Lanark), 1832, 10 S. 247.)

A heritor was entitled to sittings not only for himself, but also for his tenants and servants. The sittings being first apportioned among the heritors, they had again a choice of sittings for their tenants.

As between tenants, it was the landlord who determined the seat each tenant should occupy (*Ure v. Ramsay, supra*).²²

In *Peebles v. Jardine* (Tundergarth), 1903, 5 F. 932, the Court on appeal dismissed a petition brought in the Sheriff Court by a heritor craving declarator that the right to use certain sittings in the parish church which had been allocated to her lands "belonged to her exclusive of any right thereto on the part of the defender," a resident in the parish, and for interdict against the defender "occupying the sittings either by himself or his family or others having his authority, and from interfering with her or with those having her authority in the full use thereof." The Court held that she had no such right of property or unqualified power of delegation as to entitle her to the declarator and interdict craved; and the judgments contain observations on the right of a heritor to grant the use of sittings to persons other than his own tenants or dependants. (For Sheriff Court stage, see 18 Sh.Ct.Rep. 310.)

In the later case of *Paterson v. Brown and Another* Family pew. (Bothwell), 1913 S.C. 292 (in Sheriff Court, 26 Sh.Ct.Rep. 286), the Court granted a declarator that the pursuer "has right to the pew No. 94 in the area of the parish church of Bothwell as his family pew,

²² See also *Reid v. Ferguson* (Perthshire), March 20, 1903, 9 Sh.Ct.Rep. 232.

and that the defenders " (a feuar of part of the lands, non-resident in the parish, and his son, a resident) " have no right to any sittings therein "; and accordingly interdicted the defenders from putting furnishings or books into the said pew, or entering therein at any time previous to the commencement of public worship. The ground of judgment was that a right to a family pew in a parish church allocated to a proprietor of lands within the parish remained, until another allocation had been made, with that proprietor and his successors so long as they retained the major portion of the lands, whether they occupied the pew or not. Lord President Dunedin observed that " when there has been legal allocation the heritor's right to his family pew is exclusive . . . as to the right to sittings in it and the right to furnish it, and to exclude all others at least until the bell for service has ceased to toll." The question was mooted, but not decided, whether after the bell has ceased to ring any person is entitled to enter a vacant sitting. The form of the interdict did not prejudice this question. Lord President Dunedin incidentally expressed the opinion that an assignment of sittings in a family pew can only be established by writing.

Seat rents at
common law.

In neither landward nor burghal-landward churches were seat rents exigible at common law. In some parishes, indeed, by agreement between heritors and the kirk-session, the latter considered that they were empowered to let certain sittings which were understood not to be required by the heritors personally. Such an agreement was not, however, clearly *intra vires* of the heritors or the kirk-session; and a heritor who had in good faith, but in ignorance, acquiesced in such letting might possibly have repudiated the arrangement at any time. The question is now, however, one of merely academic interest, in view of the recent legislation noticed *infra*, p. 214.

Burghal
churches.

In *burghal* parishes the allocation of the seats was in general a matter of arrangement, the magistrates, *qua* magistrates, having the first choice. The seats

are not associated with lands (*Duff v. Brodie* (Elgin), 1769, Mor. 9644). Seats in a burgh church may be let for hire (*Clapperton v. Magistrates of Edinburgh* (Tolbooth), 1840, 2 D. 1402), and 1846, 8 D. 1130; and might even be sold by the magistrates (*Watson v. Watsons* (Dundee), 1760; Mor. 5431)—the rents or proceeds being applicable towards meeting the expenses of the conduct of divine worship in a seemly manner, not for the enrichment of the common good. (See cases cited.)

In parishes *quoad sacra* the matter of seat-letting is regulated by statute, viz., by the New Parishes (Scotland) Act, 1844 (7 & 8 Vict. c. 44). Sec. 9 of that Act provides—

Quoad sacra
churches.

In every such church as aforesaid, *a portion of the sittings therein, to be determined by the Sheriff of the county in which such church is situated, and not exceeding one-tenth of the whole sittings, shall be set apart as free seats for all persons frequenting the same: another portion, not exceeding one-fifth of the whole sittings therein, shall be let at rents not exceeding a rate to be fixed by the Presbytery of the bounds:*

Statutory
provisions
anent setting
of sittings.

And *the remaining portion of the sittings may be let in such manner as shall be agreed upon by the minister for the time being and the person or persons liable for the repair of the church and the stipend of the minister, or in case of them not agreeing then in such manner as shall be determined by the Sheriff of the county as aforesaid:*

* * * * *

And *the pew or seat rents of any such church as aforesaid may be expended and applied for the purpose of defraying the necessary expenses of a precentor, a beadle, or kirk-officer, and other expenses necessarily incurred in dispensing the ordinances of religion therein, and not otherwise provided for, and for the purpose of upholding in due repair and improving the fabric of such church or of the dwelling-house and offices of the minister, or for the relief of any person or persons who may have undertaken or become liable*

to uphold the same, or who may be liable for the endowment or stipend provided and secured for the minister of such church :

As affecting
dispensing
with seat
rents under
freewill offer-
ing systems.

In view of the increasing prevalence of the system of church finance which aims at meeting all needs by freewill offerings regularly contributed, it is important to observe the precise position of various classes of sittings under the provisions of this Act. The section prescribes that—

1. A portion of the sittings in every *quoad sacra* church, to be determined by the Sheriff of the county in which such church is situated, and not exceeding one-tenth of the whole sittings, *shall be set apart as free seats* for all persons frequenting the same. A free seat is also to be provided for the minister's family, and another for the officiating elders.
2. Another portion, not exceeding one-fifth of the whole accommodation, *shall be let* at rents not exceeding a rate to be fixed by the Presbytery of the bounds.
3. The remaining portion of the sittings *may be let* in such manner as shall be agreed upon by the minister for the time being and the person or persons liable for the repair of the church and the stipend of the minister, or, failing agreement, as may be determined by the Sheriff. And the pew or seat rents *may be* expended and applied for the purposes specified in the section.

Of these three classes of sittings, the free seats cause no difficulty. Reserving consideration for the moment of the sittings (not exceeding one-fifth) of which the Presbytery is to fix the rent, it is to be noted that with regard to the remaining sittings the provision for letting is discretionary, not mandatory. They *may be let* in such manner as the minister and parties liable for the endowment may agree on. No doubt it was con-

templated that normally they should be let. But if the parties concerned see their way to provide the funds required in another way, there seems nothing to prevent them from agreeing to dispense with letting these seats.

The intermediate class at first sight seems to present more difficulty. The provision in regard to them is in form mandatory—they “*shall be let*” at rents not exceeding a rate fixed by the Presbytery. But in substance it seems to be a provision for limiting the rents rather than for requiring letting. And if the parties concerned can agree that the remaining seats be allocated without rent, there seems no one who would have interest to insist that the sittings of this intermediate class should be let at a rent fixed by reference to the Presbytery. Accordingly, so far as the statute is concerned, in any case in which the minister and all parties who may be under obligation to uphold the fabric of the church, &c., or who may be liable for the stipend, are agreeable, another sufficient system of finance may be adopted and letting of the seats dispensed with if so desired. But of course it is a condition of this that there must be such a complete agreement. Failing that, resort may be had to the Sheriff, who is entitled to determine the manner in which the portion of the seats not reserved for free sittings or for letting under regulation of the Presbytery shall be let.²³

Although so late as the beginning of the eighteenth century an instance is found in which there was no seat set apart for the minister’s family (Mauchline, *vide* Edgar, p. 29), by long usage in all parish churches the minister has a family pew assigned to him near the pulpit. In *quoad sacra* parishes the provision is statutory under sec. 9 of the Act of 1844 already referred to, which enacts—

“Provided always that one pew shall be appro-

²³ Cf. Report of Advisory Committee on Freewill Offerings to the General Assembly of the Church of Scotland, 1924, Assembly Reports.

priated rent free for the accommodation of the family of the minister, and another pew for the officiating elders."

Method of allocation of sittings in a parish church.

If heritors concurred in an amicable allocation of the sittings in a parish church they might competently do so, without judicial interference. "The disagreement of the heritors having prevented an amicable division of the area when seated, a summons of division" was raised in the *Eccles* case (*Earl of Marchmont v. Earl of Home*, 1776, Mor., Kirk., App. 2); and Lord President Dunedin in *Brown v. Paterson* (cited *supra*) observed, "the method of allocation has been settled for all time by the *Eccles* case." It is scarcely necessary to say that the power of amicable allocation was confined entirely to the heritors; with allocation, whether amicable or directed by a Sheriff, neither minister nor kirk-session had anything to do. Since the *Falkland* case of 1739 (*Falkland Heritors v. Minister and Kirk-Session*, 1739, Mor. 7916) this has never been questioned. In the case of old churches there may be circumstances where allocation is to be presumed in the absence of a decree, or agreement (*Duke of Abercorn, &c. v. Presbytery of Edinburgh* (Duddingston), 1870, 8 M. 733, at p. 745).

Old law superseded by sec. 29 of 1925 Act.

Where no amicable division of the sittings in the order of the valuation of holding could be effected, application was made to the Sheriff of the county in which the parish is situated to make a judicial division. Consideration of the procedure in such an application, or of the numerous cases in which the principles of allocation have been discussed, is now, however, merely of historical, or at most evanescent, interest, in view of the terms of sec. 29 of the Property and Endowments Act of 1925 (which are dealt with more fully *infra*, p. 214)—under which, on the expiry of a year from the date when any old parish church is transferred under the Act to the General Trustees of the Church of Scotland, the right of allocating sitting accommodation in the church, whether with or without payment

therefor, and of disposal of any proceeds therefrom, is to belong to the kirk-session, or otherwise as the General Assembly may direct, and any existing right to such accommodation shall then cease and determine. It may be, indeed, that the cases may indicate certain equitable principles which may very well be kept in view by those taking in hand to deal with the apportionment of sittings under the new and freer system. If so, cases which have been decided subsequently to the issue of the last edition of this work have, in so far as they are of general moment, been noticed incidentally above; while those decided earlier will be found treated of with considerable fulness in the earlier editions. And it does not seem that the practical value of the earlier cases under the new circumstances renders it necessary or desirable to carry them forward into the present edition in any detail. From this restriction, however, three cases may be excepted because of their general interest and of their importance in settling questions of principle, and also because they relate to burgh churches. For in regard to these churches the Ecclesiastical Commissioners appointed under Part II. of the Property and Endowments Act, 1925, have a duty to inquire into, *inter alia*, "pew rents or assessments from which the stipends of the ministers, the maintenance of the churches and other subjects, and any other expenditure in connection therewith is defrayed." And in framing schemes they are directed to make provision for, *inter alia*, "the protection . . . of the interests of town councils in the burgh churches as regards sittings allotted to the town councils for their use."

Of the cases referred to, the first is that of St. Giles (*Edinburgh Ecclesiastical Commissioners v. Kirk-Session of the High Kirk, Edinburgh*, 1888, 15 R. 952). All the pew rents of the parochial churches of Edinburgh were by the provisions of the Act 23 & 24 Vict. c. 50 received by the respective kirk-sessions, and paid over by them to the Edinburgh Ecclesiastical Com-

missioners, who, out of a common fund, paid all the Edinburgh parochial clergy. When St. Giles was restored the area formerly separated and used as the church of West St. Giles was incorporated with the High Kirk, and became its nave; the old pews of West St. Giles were removed, but as the congregation of the enlarged church increased, the kirk-session of the High Kirk placed chairs in the nave, which were paid for. The Ecclesiastical Commissioners claimed the right to receive the seat rent of these chairs just as they received the seat rents of the pews. The kirk-session contended that it was incorrect to say the chairholders were made to pay "pew rents." "The chairholders gave a donation or subscription to the funds of the church." This was held to be no good argument. If the Ecclesiastical Commissioners were entitled to the seat rents of one portion of the High Kirk, they were entitled to the seat rents of all portions. The Second Division decided in favour of the Commissioners, and, in view of the clear provisions of the 1860 Act, no other decision could be looked for. Lord Young's exposition of ecclesiastical parochial law as regards church seats, kirk-sessions, &c., is particularly instructive.²⁴

The other two cases are those of *Clapperton v. The Magistrates of Edinburgh*, 1840, 2 D. 1385, and 1846, 8 D. 1130; and *Mackay v. Wood* (Brechin), 1889, 17 R. 38, which laid it down that even in burgh churches seat rents could not be levied for the personal benefit of the heritors. The rent must be applied "to the support of the poor, or to some other appropriate pious use within the parish." Magistrates may let that portion of the church allocated to them; the money received should be applied to the cost of church repairs, and of

²⁴ By Order No. 7 of the Scottish Ecclesiastical Commissioners ("Edinburgh Burgh Churches"), issued on 30th December, 1926, the right of allocating and letting the sittings in St. Giles, as in the other Edinburgh burgh churches, is vested in its kirk-session (subject, however, to the terms of a certain agreement); but the proceeds, after deduction of the expense of collection, have to be accounted for and transmitted to the General Trustees of the Church of Scotland.

providing for the due celebration of public worship within it. The money cannot be applied to the ordinary revenue of the burgh (*Clapperton, supra*), and the opinion has been expressed that it is only so far as money is required for the church that it is leviable. In the case of Brechin certain seats were in 1807 allocated to various corporations of the town. The corporations let the seats, and, as the corporations decayed in importance, the revenue from seat rents came in certain cases to be their only revenue, and was spent in an annual supper, or in some similar way unconnected with any church purpose. Ultimately, the minister of the first charge, and certain of the elders, purchased the rights of the corporations to the seats, and notice was given in December, 1886, from the pulpit, that the seats would be allocated to the then seatholders and others, and the rents would be applied to meeting the purchase price and keeping the seats in order. It was also intimated that when the purchase price was paid up to the elders, and the seats were thus free of debt, the seats would be handed over to the kirk-session, to be held for the good of the congregation. Disputes afterwards arose with parties who claimed that no power to levy seat rents had been acquired by the purchasers, and the purchasers raised an action against those parties to have them interdicted from occupying the seats without charge. The Second Division of the Court of Session refused interdict, holding that the pursuers did not, by the purchase of the seats, acquire any legal right to allocate them as they might choose, or to exclude any parishioner from occupying any seat in the parish church (*Mackay v. Wood* (Brechin), 1889, 17 R. 38). The Lord Justice-Clerk (MacDonald) observed that although each corporation became a kind of trustee in 1807 for its members, holding the seats for the purpose of apportioning them among the members, they had no right to deal with the seats for pur-

²⁵ An interesting examination of this case and of the law involved will be found in "The Juridical Review," 1890, vol. ii., p. 194.

poses of general gain, and as the purchasers in 1886 could not take over the trust which was committed to the corporations as such, neither could they by purchase acquire right to allocate sittings or to levy seat rents.²⁵

Right under
allocation one
of occupancy
merely.

The seats were the property of the heritors; persons sitting therein had a right of occupancy alone. It seems scarcely necessary to observe that to padlock or otherwise secure a pew door in a parish church is utterly foreign to the theory of parish worship, which contemplates by allocation of seats merely the seemingly placing of accommodation for parishioners, not the creation of private rights as against public need for accommodation. This is clearly indicated by the words of Pardovan, who says—"The keys of the seats are to be kept by Beddals, that when the proprietors are absent, such as want seats, or thronge the seats of others, may be accommodated for the time. But in case the owners be so little concerned with religion as not to countenance the public worship of God, or averse to serve such as attend upon it with their empty seats, the people that want accommodation cannot be blamed to possess and occupy that void in their absence. And if the owners, or others by their order, shall offer to dispossess them violently, especially in time of divine service, they should be prosecuted as disturbers of public worship, both before the civil magistrate and church judicatories" (bk. ii., xiii. 8).²⁶ The observations made on this and the preceding pages refer to sittings in parish churches only.

VII. Towers
or belfries.

It is not unusual to adorn our churches with towers. When they became usual parts of architectural design or for what purpose they were intended is uncertain. Obviously as isolated towers they served as watch towers or places of refuge in times of danger. And later

²⁶ Pardovan previously observes—"It would look more impartial like, and resemble more that humility, love, and simplicity recommended to Christians by the Apostle, and would look liker the subjects of Christ's Kingdom which is not of this world, if church members would take their seats in the church without respect to their civil character, as they do at the Lord's Table" (bk. ii., xiii. 7).

they became useful as affording a place for the safe custody of and convenient access to bells. At present any towers form only a picturesque and expensive part of an ecclesiastical design. In a town neither the tower nor the bells which is contains are necessary or appropriate, and the space which a tower occupies and the money which it costs would perhaps often be better utilised in the erection of a dwelling-house for the minister forming part of the ecclesiastical edifice. The Church of Rome invariably attaches such a house to its modern churches in this country; for this practice there being indeed the special reason that a priest may require at any hour of the night to take the Sacrament from the church to a dying parishioner. But although this is, as has been observed, a special reason, yet every consideration of propriety and convenience points to a Protestant clergyman having an official residence in immediate connection with the church which he serves. Our poor people are surely as much entitled to immediate and ready access to their minister as are the Roman Catholic poor. It is too often made an excuse for the wholly indefensible practice of non-residence by a clergyman within his city parish that there is no suitable house where he and his family may live. The money spent all over Scotland on ugly towers and noisy bells (for the provision of which there is certainly no duty in consuetudinary law) would have provided all that is lacking in the parishes where such excuses can be urged. But although the provision of such towers, steeples, or elaborate belfries was not incumbent on heritors as in implement of their duty to provide the church, it does not seem open to question that once such a tower, &c., had been erected by them as part of the church, the heritors were liable to maintain it just as much as any other part of the church; and it follows that the obligation of putting the church into a reasonable state of tenantable repair (or of paying a sum in lieu thereof), which is created by sec. 28 of the Act of 1925, extends to the tower, &c., just as to

Obligation to keep in repair extends to tower, once erected.

the rest of the fabric. In this connection it may be noticed that the practice which prevailed in the latter half of the eighteenth and first half of the nineteenth centuries of erecting as parts of burgh churches massive and ornate towers or steeples, sometimes with heavy peals of bells therein, suited rather for municipal adornment than for church services, has given rise to difficult questions in connection with the transfer of burgh churches under schemes of the Ecclesiastical Commissioners, in regard to provision for the future maintenance of portions of the structure which involve a cost for upkeep quite out of proportion to the value of them for any ecclesiastical purpose.

No opinion is expressed by the authors as to the strict liability of heritors in the past to provide any of the *ornamenta* mentioned in this chapter, with the exception of the table, pulpit, pews, and necessary articles for celebration of the Sacraments. There has been, and is, perhaps, a want in the Church of Scotland of some guidance in questions of ritual and *ornamenta*. But the judicious observation of Lord Chancellor Selborne in *Mackonochie v. Lord Penzance*, 1881, L.R., 6 App.Cas. 424, at p. 433, may well be kept in view, that the object of ecclesiastical law is not so much "the punishment of individual offenders, but the correction of manners and the discipline of the Church." It is true that the Presbyteries are charged with disciplinary powers, but the training, tastes, and varied duties of the members have as yet seldom encouraged them to deal as having assured knowledge with such questions.²⁷

²⁷ A similar difficulty as to ceremonies is very clearly put by Tyndale in his "Fruitful and Godly Treatise Expressing the Right Institution and Usage of the Sacrament of Baptism and the Sacrament of the Body and Blood of our Saviour Jesus Christ," written after April, 1533; printed, 1573:—

"He that, being of a lawful age, observeth a ceremony *and knoweth not the intent*, to him is the ceremony not only unprofitable, but also hurtful, and cause of sin; in that he is not careful and diligent to search for it, and he there observeth them with a false faith of his own

SECTION II. THE LAW AS MODIFIED BY THE STATUTES OF 1921 AND 1925.

From consideration of the former section of this chapter it will be apparent that the law relating to the *ornamenta* of the Church as it existed prior to the recent legislative changes resolves itself into two distinct categories. There is, first, a body of consuetudinary law, derived from the experience and custom of the Church itself, dealing with what in the way of *ornamenta* is seemly and consistent with the doctrinal position of the Church, not defining this indeed with precision but indicating general lines approved by the Church. Then there is, further, a body of rules of positive law, to some small extent statutory, but very largely developed by decisions of the Courts of law regulating relative rights and duties in regard to the provision, maintenance, and use of the *ornamenta* in regard to which the Church has stood *vis-à-vis* the lay members of the community who have been subject to duties or possessed of rights in regard thereto. Now the recent legislation has materially affected the law under both of these categories, but much more notably that falling under the latter than under the former.

The Articles appended to the Church of Scotland Act, 1921 (now adopted as the Constitution of the Church) give recognition to the right and power of the Church, "subject to no civil authority to legis-

Statutes affect both consuetudinary law of the church and that applied by civil Courts.

11 & 12 Geo. V. c. 29. Completeness of control now recognised in the church.

imagination, thinking, as all idolaters do and ever have done, that the outward work is a sacrifice and service to God. The same therefore sinneth yet more deeper and more damnable. Neither is idolatry any other thing than to believe that a visible ceremony is a service to the invisible God" (Tyndale's "Doctrinal Treatises," Parker Society, 1848, p. 362). The Directory gives no precise directions as to ceremonies. It sets forth "such things as are of Divine institution in every ordinance; and other things we have endeavoured to set forth according to the rules of Christian prudence, agreeable to the general rules of the word of God; our meaning therein being *only* that the *general* heads, the sense and scope of the prayers, and other parts of publick worship being known to all there may be a consent of all the churches in those things that contain the substance of the service and worship of God."

App. II.,
p. 591.

late and to adjudicate finally in all matters of doctrine, *worship*, government, and discipline in the Church" (Schedule to Act of 1921, Art. IV.). This obviously involves a sharper definition and fuller recognition than hitherto of the absoluteness of control resting in the Church—especially when it is read along with the provisions in the Church of Scotland (Property and Endowments) Act, 1925, for the vesting of old parish churches in parishes *quoad omnia* in the Church through its General Trustees, and for the early extinction of the duties and corresponding rights of the heritors in respect of these, and the transference of these duties and rights to the General Trustees (Act, Pt. III., secs. 26-29 and 33), and with the similar provisions relating to *quoad sacra* churches (Pt. IV., sec. 34), and to burgh, parliamentary, and Highland churches (Pt. II., secs. 20-24). The Church is now complete "master in its own house" in regard to these matters; and, when the fruits of the Acts have been fully reaped, those rights and duties which existed between the Church and the heritors, and which formed the subject of regulation by the civil Courts, will disappear. But just because of the absoluteness of the Church's mastery, the summary of the law founded on the custom of the Church in regard to its *ornamenta* which has been here given will probably retain its value. For in the exercise of its mastery the Church will, it may be supposed, continue to seek guidance from those rules which are the outcome of the experience and of the usage of centuries, and which are the product of its own evolution, and not of the dictates of the Legislature or the Courts. For this reason it has been thought well to retain in considerable detail the statement of this side of the law as to the *ornamenta*.

On the other hand, the impending supersession of the rights and duties hitherto possessed by or incumbent on the heritors, and the transference of these to the Church itself—to the discretion of which it is confided to judge of what is due to them—have automati-

cally superseded those rules of statute and decision around which a mass of detail had grown up (which would in other circumstances have had to be expounded and brought up to date); and has rendered it possible and indeed expedient to exclude or greatly to circumscribe consideration of them in this and the following chapters.

It is unnecessary here to enter into the details of the sections above referred to which transfer the various churches, and the rights and duties of the heritors and others in regard to the provision, upkeep, and use of them and their pertinents to the Church through its General Trustees. These will be more appropriately considered in other chapters. (Cf. Chaps. IV. and VII.)

But it may be useful to cite here the text of certain clauses dealing with particular items of *ornamenta* which have been considered in the earlier part of the chapter.

Under sec. 21 of the Act of 1925 the Ecclesiastical Commissioners to be created under sec. 20 " may, after such inquiry in each individual case as they may think fit, make such orders as they may consider necessary or proper," *inter alia*—

Provisions of
1925 Act
affecting
particular
ornamenta.

(h) for the protection and preservation of any church or other ecclesiastical building which the Commissioners may, upon application made to them by the Royal Commission on Historic Monuments in Scotland or any person interested, consider to require special provisions in the public interest with respect to maintenance and access;²⁸

Protection,
&c., of
historical
churches, &c.

* * * * *

(j) for the transfer to a kirk-session of communion plate or other ecclesiastical furnishings in use in a church or by a congregation in any case in which a right of property in the plate

Transfer of
communion
plate, &c.,
in certain
cases.

²⁸ Such provisions in regard to access have been made with regard to St. Giles, Edinburgh, under sec. 12 of Order No. 7 of the Scottish Ecclesiastical Commissioners ("Edinburgh Burgh Churches").

or other furnishings is claimed by any public body;

- (k) for any other matter or thing which the Commissioners consider to be necessary or proper in connection with any of the purposes aforesaid.

The powers of the Commissioners in regard to these matters appear to be quite general, and open to be exercised, although the church affected, or in connection with which the furnishings are used, may not be one regarding which the Commissioners are empowered to frame any scheme.

In Burgh Churches.

Further, in the schemes which under sec. 22 (1) the Commissioners are directed to frame with respect to the "Burgh Churches," enumerated in the Ninth Schedule to the Act, it is provided (sec. 22 (2)) that "every such scheme shall make provision for," *inter alia*—

- (g) the protection (so far as the Commissioners consider this to be practicable) of the interests of town councils in the burgh churches as regards sittings allotted to the town councils for their use, the right to have the church bells rung on special occasions, and the preservation of any other similar right or privilege hitherto enjoyed by the town councils.

Sitting accommodation in churches of all parishes.

As to "rights with respect to sitting accommodation in parish churches" (*i.e.*, *quoad omnia* (sec. 26)), sec. 29 provides as follows:—

29. On the expiry of one year from the date on which any church is by or in pursuance of this Act transferred to the General Trustees the right of allocating sitting accommodation in the church, whether with or without payment therefor, and the right of disposal of any proceeds therefrom shall belong to the kirk-session, or to such other body as the General Assembly may direct, and any existing right to such accommodation shall cease and terminate.

This section deprives of any continuing practical utility the long series of decisions noticed in former editions, and continuing down to quite recent days, dealing with the rights of heritors in the pews and the application of the pew rents in parishes to which the section applies. Having regard to the provisions of sec. 26 as to the scope of Part III. of the Act, the section does not apply to *quoad sacra* parishes, the letting of seats in which is still governed by the provisions of the New Parishes Act, 1844, noticed above. Nor does it apply to the parishes mentioned in the Eighth Schedule to the Act, nor to "Parliamentary" or burgh churches. On the other hand, it does apply to the case of a parish *quoad omnia* which a Sheriff has by virtue of sec. 28 (4) appointed to be dealt with by the Commissioners who therefore have, it is thought, no power in such a case to make any order as to the right to let sittings or the disposal of seat rents inconsistent with sec. 29.

Application of sec. 29 of 1925 Act limited to churches of *quoad omnia* parishes.

As regards "Burgh Churches," one of the items into which by sec. 22 (1) the Ecclesiastical Commissioners are to inquire is "pew rents or assessments . . ." from which the stipends of the ministers and other expenditure are defrayed.

In Burgh Churches the Commissioners may provide by scheme.

Finally, for the preservation of monuments, &c., in churches and churchyards, sec. 33 enacts as follows:—

Preservation of monuments, &c.

33. For the preservation and maintenance of any family burying ground, or enclosure, tombstone, monument, or other memorial to the dead, in any . . . parish church, any person who . . . in the case of a parish church satisfies the General Trustees that he has an interest in such burying ground, enclosure, tombstone, monument, or other memorial, on the ground of relationship to the deceased person or persons therein buried or thereby commemorated, shall be entitled, with the approval of . . . the General Trustees, . . . to provide for the preservation and maintenance of the same.

CHAPTER VI.

CHURCHYARD.

CHURCHYARD—a space of ground, as near as possible to the parish church, in which all parishioners have a right of interment.

Historical
summary.

“CHURCHYARDS are dormitories for human bodies,” says Pardovan, “and ordinarily that spot of ground within which the church stands” (Bk. ii. tit. iii. 2).

Where there was no graveyard, or one of insufficient size, the burden of providing a graveyard has hitherto rested on the heritors (*Ure v. Ramsay* (Tilliecoultry), 1828, 6 S. 916; *Heritors, &c., of South Leith v. Scott*, 1832, 11 S. 75; *Town of Greenock v. Stewart*, 1777, Mor. 8019; also S. v.—*Kirkyard*, App. No. 1; and 2 Hailes, 758). If this was not done voluntarily, either the Presbytery or the parishioners were entitled to require the heritors to implement their obligations—the parishioners acting by application to the Presbytery, which might, however, of its own accord move in the matter. If the deliverance of the Presbytery was disregarded, that body might select what land was needed, and intimate this to the heritors generally, and in particular to the heritor who was proprietor of the selected ground. If the heritors still refused to implement their obligations, the Presbytery could proceed, by civil action against the heritors and kirk-session, to vindicate its rights and those of the parishioners.

Parochial
burying
grounds.

PAROCHIAL BURYING-GROUNDS were regulated partly by statute and partly by common law.

In the great majority of parishes (other than parishes erected *quoad sacra*) there is a sufficient parish graveyard. The right of interment belongs not alone to the heritors, nor to the congregation worshipping in the parish church; all who are parishioners, as

being residents in the parish, are entitled to be buried there.

Down to the passing of the Property and Endowments Act (28th May, 1925) the property of the *solum* of the CHURCHYARD was normally vested in the heritors (*Fraser v. Turner* (Dunfermline), 1893, 21 R. 278); they held the CHURCHYARD as they did the CHURCH, *i.e.*, in virtue of their position as a *quasi*-corporation, but in trust for the parishioners. It was their duty to see the graveyard maintained in a decent and orderly fashion, with sufficient walls—if walls were necessary—to guard against encroachment on graves,¹ and to provide convenient means of access. The kirk-session were associated with the heritors, possibly in some cases as co-guardians, more usually as their representatives always familiar with the course of parish events, to see that these obligations are observed.²

Cattle may not graze in a parish graveyard. Restrictions on use.
 “If the heritors allow the minister to pasture his cattle in the churchyard, they allow what they have Use of grass.
 no right to do; for, although the churchyard may be the property of the heritors, as every subject must have a proprietor, yet it is a property *sub modo*, and cannot be either ploughed or pastured,” per Lord Hailes (*Grierson v. Ewart*, 1778, 2 Hailes’ Decisions, at p. 800). The grass may be sold and the proceeds applied to pious uses (*Town of Greenock v. Stewart*, 1777, 2 Hailes, 758); but the grass or the rent for it has also been held to belong to the minister (*Spence v. Darling* (Old Cambus), Dec. 1, 1808, F.C.).

¹The first decree of the diocesan synod, held at Musselburgh in 1242, set forth that churchyards should be “properly enclosed and protected against wild animals.” At a visitation of the parish of Auchterdirran by the Presbytery of Kirkcaldy, 23rd April, 1640, “the minister compleanes that the kirkyaird dykes are not built. The brethren recommends that to the heritors” (“The Presbyterie Book of Kirkcaldie,” p. 178).

²Heritors were not owners of a churchyard in the sense of the Burgh Police Act, 1892. (See *Elie Heritors v. Elie Police Commissioners*, 1893, Sheriff Court of Fifeshire, 10 Sh.Ct.Rep. 81.)

It is not to be computed as minister's grass (*Beaton v. Dallas*, 1734, Elchies, Glebe, 1). It is minuted in the Session Records of 1750 of Mauchline parish that "the kirkyard grass, according to use and wont, belonging to the minister especially as not being sufficiently provided in grass according to law, was roused and set for the ensuing season at eighteenpence, which the minister gave in compliment to the poor" (Edgar, "Old Church Life in Scotland," p. 49). (Cf. *Mackechnie v. Edrom Parish Council*, 1927, 43 Sh.Ct.Rep. 147; S.L.T. (Sh.Ct.) 49.)

A right of way cannot be constituted through the churchyard, other than one of access to the church, &c. (See sec. 32 (1) (a) and (c) of Act of 1925, *infra*, pp. 248, 249.) It may be used for purposes of sepulture, but for no other purpose.

Nature and
extent of
parishioner's
right of
interment.

While every parishioner has a right to interment, no one is in theory entitled either to claim that in perpetuity a certain plot should be his burying-place alone, or that by long-continued usage his forefathers and he have acquired right to interment in a certain special plot. (See, however, sec. 33 of the Property and Endowments Act (*infra*, p. 250) as to preservation and maintenance by relatives of family burying-grounds, monuments, &c.)

Erskine, in his Principles, when treating of the second head "of things that fall not under commerce," says—" *Res universitatis*, things which belong in property to a particular corporation or society, and whose use is common to every individual in it; but both property and use are subject to the regulations of the society, as town-houses, corporation halls, market-places, CHURCHYARDS, &c." (Bk. II., i, 2).

The right of EACH PARISHIONER, in short, is but to a place to sleep in till his body has returned to dust, just as in life he had a right to his place in the market-place as a citizen. He had no property in the market-place, and he has no property in the grave. This subject was treated by Sir William Scott (afterwards

Lord Stowell) in his judgment in the singular case of *Gilbert v. Buzzard & Boyar*, 1820 and 1821, 2 Hag. Consist. Reports, 333. The husband of a lady parishioner of St Andrew's parish, Holborn, wished to bury her in an iron coffin. The churchwardens refused permission, and an action was raised against them. In his judgment Lord Stowell summarised modes of burial from the earliest times, and quoted Sir Thomas Browne, Cicero, and other learned men—coming to the conclusion that uncoffined interments had been by no means unusual in England. “The rule of law which says,” he observed at p. 348, “that a man has right to be buried in his own churchyard is to be found, most certainly, in many of our authoritative text-writers, but it is not quite so easy to find the rule which gives him the right of burying a large chest or trunk in company with himself. That is no part of his original or absolute right, nor is it necessarily involved in it. That right, strictly taken, is to be returned to his parent earth for dissolution, and to be carried thither in a decent and inoffensive manner. When these purposes are answered, his rights are, perhaps, fully satisfied in the strict sense in which any claim, in the nature of an absolute right, can be decerned to extend” (p. 348). Again—“The legal doctrine certainly is and has remained unaffected, that the common cemetery is not *res unius ætatis*, the property of one generation now departed, but is, likewise, the common property of the living and of generations yet unborn, and subject only to a temporary appropriation. There exists in the whole a right of succession, which can be lawfully obstructed only in a portion of it by public authority, that of the ecclesiastical magistrate, who gives occasionally an exclusive title in such proportion to the succession of some family, or to an individual who has a fair claim to be favoured by such a distinction, and this, not without a just consideration of its expedience, and a due attention to the objections of those who oppose such an alienation

from the common property. Even a bricked grave, granted without such an authority, is an aggression upon the common freehold interests, and carries the pretensions of the dead to an extent that violates the rights of the living " (p. 353). Ultimately the use of metal coffins was allowed, subject to payment of an increased rate for interment.

Nature of
patrimonial
interest of
heritor in
family place
of interment.

The principle underlying this judgment has been frequently applied by the Scottish Courts. While, however, a parishioner has not a right of property in his lair, but only a right of occupancy till dissolution, which depends on the nature of the soil (but twenty-five years should be more than sufficient), he has undoubtedly A PATRIMONIAL INTEREST in the place where his forefathers are laid, and that, it would seem, whether he intends himself to be laid beside them or not. In *Hill v. Wood* (Coupar-Angus), 1863, 1 M. 360, the plans of a new church for the parish of Coupar-Angus showed that the session-house and vestry were to be built over a family burial-place. The heritors whose forbears lay there raised an action of interdict against the committee of heritors, and alleged an allocation, though never formally, of the area from "time immemorial, at least for sixty years or thereby." The suspender was non-resident. The Court held that he had A PATRIMONIAL INTEREST which he was entitled to protect, and that no case of necessity had been made out for occupying the burial-place, and granted interdict. The opinions of the judges in this case well illustrate the principles underlying the rules of the common law as regards the nature of the right in ground allocated as a family place of burial. And although the conditions to which these principles fall to be applied have been somewhat modified by the modern statutory enactments noticed hereinafter (*e.g.*, the Burial Grounds (Scotland) Act, 1855, and the Property and Endowments Act, 1925, secs. 32 (1) and (2) and 33), it is none the less important to apprehend the principles

themselves as expounded in these early cases as guides for determining similar questions when they arise under the new conditions. It is therefore worth while citing, even at some little length, the opinions of the judges in *Hill v. Wood*, as affording one of the fullest and most satisfactory statements of these. In that case Lord Cowan, who gave the leading opinion, said (p. 369), “ That an heritor, who has assigned to him a portion of the churchyard of the parish as a family burying-place, has no right of absolute property in the ground cannot be disputed. The property right rests with the heritors, with whom also rests the power of allocation and regulation of the churchyard. The existence of a place of sepulture for the use of the family in the several parishes of Scotland has been recognised from the earliest times. In the statute of 1563, soon after the Reformation, care was expressly taken by the Legislature that the churches and the churchyards within the parishes of Scotland should be looked after and provided for by the Privy Council. That led to certain regulations by the Privy Council, which, it will be seen from the Act of 1572, had been either disregarded or neglected. The Act of 1572 was passed in order to regulate matters in reference to the erection of parish churches; and in that statute there is no reference to churchyards, although in the earliest statute they were specially referred to and recognised as subjects which the heritors ought to attend to as much as parish churches. But, in a subsequent statute, the burden of taking care of the churchyards within the parishes is thrown on the heritors, inasmuch as the expense is laid on them of enclosing the ground, so as to prevent any encroachment or trespass on the places where the remains of the families of the parish lie buried. While, therefore, it cannot be said that there is anything more than a right of use in the party to whom ground has been allocated—and the proprietary right may be viewed as in the heritors as a body—still, their right

Hill v. Wood.
Lord Cowan.

is not absolute. The churchyard is held by them in trust as a place for the burial of the dead. It is for that purpose alone that they are possessed of administrative and regulative powers. Where the ground is allocated, and the right of use for that special purpose is recognised to be in any heritor and his family to whom a portion of it has been allocated, the law will not permit the ground to be arbitrarily interfered with by the heritors. Nor will it be any answer to his objection to the violation of his burial-place that a right of sepulture elsewhere in the churchyard will be awarded to him. That offer was made in this case by the heritors to Mr. Hill, and that seems to be dwelt on by the Lord Ordinary as really meeting the exigencies of the case, and destroying, to a great extent, the essential objection that Mr. Hill had to what was proposed to be done with regard to his burial-place. But I apprehend that it is to mistake the character of the right to call it merely a right of sepulture to be exercised in future. It was justly observed by Lord Curriehill in a recent case—‘Where ground so allocated has been used for the interment of one’s family and kindred, he is entitled to prevent their graves from being violated or disturbed, and the ground from being encroached upon, for the law goes far to save those feelings of regard which are deeply implanted in the human heart for the remains of deceased relatives.’ And of the view the law takes of this kind of right, no stronger illustration can be found or desired than occurred in the case of *Wright v. Lord Mansfield* (Scone), 1824, 2 Sh.App. 104, which went to the House of Lords, and was affirmed on the 17th March, 1824. In that case the suspender complained of the obstruction of his free access to a family burial-place, caused by the removal of the church and churchyard from their old site, which was within the Scone Palace grounds and the enclosure of the grounds. He sought the sanction of this Court to the proposal that this ground, which

Right more
than merely
one of future
interment.

was the burial-place of his ancestors, should be surrounded with a wall, and that he should have free access to it whenever he thought fit to visit the resting-place of his relatives. That claim was resisted, but the right was recognised by the Court of Session, and the judgment was affirmed by the House of Lords. Further; I need not remind some of your lordships, at least, of the recent case we had in this Division—*Wilson v. Brown* (Muckhart), 1859, 21 D. 1060—in which Lord Wood delivered the opinion of the Court, and which was decided on the same legal view of the legal right which a parishioner or a heritor has to the burial-place of his ancestors in the parish churchyard, effect being given to that right, although it was orally constituted. Now, in this case, Mr. Hill and his family have used this burial-place from 1798. Various of his near relatives and friends have been buried in it, and it was as much and as effectually allocated as if there had been a written title granted to him for its special use as a burial-place for his family.”

Lord Benholme said (p. 373), “ It is true there is no absolute right of property in such individual, the fundamental feudal right of property remaining to the heritors. But if it be not a feudal right, at all events it is a *quasi* right of property. The feudal right in the churchyard is held in solemn and sacred trust for behoof of the parties whose ancestors lie there, and who have had this churchyard divided by express or tacit allocation, so as to give each of them a very interesting right to a particular portion of the churchyard. That right involves, in the first place, the duty and privilege of seeing that no desecration is committed on the remains of the dead. It includes the right of revisiting these places of sepulture, and adorning them with such monuments as they may be inclined to erect to the memory of the dead. But, further, it involves the very interesting right that their own remains and those of their near relations shall be laid where their ancestors lie. All these

Lord Ben-
holme.

rights combined together are inseparably connected with a burying-ground."

Lord Neaves. Lord Neaves further gave it as his opinion (p. 375), " Every one who has a place of sepulture which he and his family have possessed for a considerable time has a legal interest in it, a patrimonial interest, I think, as well as an interest of feeling and attachment. It is not a right of property; it is certainly not a right to sell; but it is an interest of a strong and high character. It is a right that has been protected by a special individual contract, for we all know that in the middle of extensive estates, and even of pleasure grounds, there are burial-places preserved, under certain conditions, for the use, or in reverence to the feelings, of those families who originally devoted them to that sacred purpose. These feelings the law recognises, and, founded as it is on human nature, it would be false to its own principles if it did not recognise them."

Lord Justice-Clerk Inglis.

And the Lord Justice-Clerk said (p. 377), " I think that the right of Mr. Hill to this burial-place, like the right of any other heritor to a separate portion of the churchyard of which he is in exclusive possession, though it is not a right of feudal property, nor perhaps a right of property in any strict or technical sense of the term at all, is yet such a right as he is entitled to defend—a right of which he cannot be deprived even by the general body of the heritors administering the affairs of the parish, except on the grounds of some absolute necessity or some such high expediency as in such cases, and in many other departments, the law considers as equivalent to such necessity. But it appears to me that, when the heritors proceed on this ground to invert the possession of burial-places within the parish churchyard, they are bound to address their minds to the consideration of the question fairly and deliberately—to weigh, on the one side, the rights and interests with which they are going to interfere, and the necessity and expediency,

on the other, which they think justify the interference; but, in the present case, as your lordships have very well pointed out, nothing of the kind has been done. It is quite clear on the face of this proof, as we now have it, that the interference of the heritors with this place of sepulture, and the proposal to erect a building on it, was a procedure taken by the heritors, or perhaps, more correctly, by the building committee of the heritors, *via facti*, without the slightest deliberation, without the least regard to or consideration of the rights of individual heritors on the one hand, or of the kind of necessity or expediency which would justify it on the other."

In applying the decisions and *dicta* in this and other cases noticed below to present-day conditions, it must be borne in view that the provisions relating to the SALE OF A RIGHT OF BURIAL contained in sec. 18 of the Burial Grounds (Scotland) Act, 1855 (for which see *infra*, p. 257), are by sec. 32 (2) of the Property and Endowments Act, 1925, declared to apply to any churchyard transferred to a parish council by or in pursuance of that Act (*i.e.*, all parish churchyards heretofore held by the heritors or by the kirk-session of a parish) (32 (4)), and to any enlargement or extension thereof.

In *Wilson v. Brown* (Muckhart), 1859, 21 D. 1060, one of the cases referred to with approval by Lord Cowan, the allocation of Wilson's lair had been made in 1833 in an informal way by the minister of Muckhart on behalf of the heritors. He buried an aunt of his wife there in 1833; subsequently this lair and another lair, which, in 1845, Wilson had acquired from the clerk to the heritors and the beadle, were allocated by the heritors to Mr. Gibson, a heritor of the parish. The Court held that the heritors were not entitled without necessity to make this reallocation, and interdict was granted against Mr. Gibson. Lord Cowan said (p. 1065), " Though the allocation to

Power of heritors to allocate right of burial, and method of its exercise.

the petitioner was by these functionaries and not directly by the heritors, it is not therefore to be held to be bad; on that footing all the allocations of burial-ground that took place while this kind of delegated management subsisted by the tolerance of the heritors would be held invalid. I cannot accede to an arrangement that must lead to such a result. Such as it was, the petitioner certainly got a right of sepulture in those lairs.’’

Lord Kinnear, as Lord Ordinary in *Russell, &c. v. Marquess of Bute* (Rothesay), 1882, 10 R. 302, observed, “The heritors have undoubtedly very large powers of regulation and contract. In the exercise of these powers they may allocate particular portions of the churchyard as places of sepulture to particular heritors, and the heritor in whose favour such a grant has been made may acquire a patrimonial interest in the portion of the burying-ground set apart for him, of which he cannot be arbitrarily deprived. But it would be contrary to all the authorities to hold that, either by express grant or use, he can acquire a right of property which will enable him to exclude the administration and control of the body of heritors.’’

In *Turner v. The Committee for the West Church, Greenock*, 1869, 7 M. 538, it was held that the non-resident representatives of a family had a sufficient title and interest to raise an action to protect a family burial-ground in a closed churchyard.³

In *Steel v. Kirk-Session of St. Cuthbert's Parish, Edinburgh*, 1891, 18 R. 911, the churchyard had been closed to interments for seventeen years when the heritors were authorised to encroach upon the

Encroach-
ment for
proper pur-
pose not
barred after
due interval.

³Cf. per Sheriff Lees in *Heugh v. Airth Heritors* (Stirlingshire), 1903, 19 Sh. Ct. Rep. 163, at 166—“It was urged for the defenders that, as the pursuers are not resident now in the parish, they *ipso facto* lose any right they had to bury in the churchyard. I should be sorry to sustain such a plea. Nothing is more common or more natural than for persons who have long ceased to be parishioners to be brought back to be laid beside their parents and forefathers.” Cf. also Property and Endowments Act, 1925, sec. 33.

burying-ground in enlarging the church, no private rights or feelings of individuals being interfered with. It was observed in this case by the Lord President (Inglis) that a singular successor has no right to the place of sepulture which has belonged to the family of the former proprietor of the lands. In the recent case of *Trustees of St. Mary's and St. Peter's Scottish Episcopal Church, Montrose, Petitioners*, 1926 S.C. 750, in which the trustees of the fabric and members of the vestry of a non-established (Episcopal) stated that a proposed extension of the fabric of the church would entail encroachment on part of the graveyard surrounding the church, they craved the Court in the exercise of its *nobile officium* to authorise the removal (subject to certain conditions) of gravestones on the ground in question, and their re-erection upon or near the fabric of the new building. On a report to the Court that the proposed operations were expedient, the Second Division (Lords Ormidale and Hunter, *dub.*) held the case to be suitable for exercise of the *nobile officium*, and granted the prayer of the petition.

In the case of *Fraser v. Turner* (Dunfermline), 1893, 21 R. 278, relative to the Abbey Churchyard of the parish of Dunfermline, it was held (per Lord Young) that it is within the power of the heritors who hold the property of the *solum* of the churchyard as trustees, with a duty to use it and see that it is used only as a churchyard, "to compromise questions regarding its extent with conterminous proprietors, subject to the control of the Court of Session at the instance of any one having a legitimate interest."

It is neither usual nor necessary to allocate the area of a graveyard as a whole; but when this is done the order of choice among the heritors in a landward parish is the same as when seats are to be allocated. A heritor is entitled to burial-place for his tenants and servants, just as he is entitled to sitting-room for them in the church.

No right
in singular
successor
of heritor.

Further as to
allocation.

As to objections by lairholders to heritors lowering the level of a churchyard about the walls of the church, see *Robertson, &c. v. Salmon, &c.*, 1868, 5 S.L.R. 405.

A heritor is not entitled to subvert the ordinary uses of a parish graveyard. Thus, in the *Tulliallan* case, it was held by Lord Adam, Ordinary, that certain heritors and parishioners were entitled by interdict to prevent another heritor from converting the family mausoleum in an old parish churchyard into an Episcopal chapel (*Wright, &c. v. Lady Elphinstone* (Tulliallan), 1881, 8 R. 1025).

The old churchyard of Overton in this case had been the graveyard of the parish of Tulliallan till 1672 or 1673, when a new one was formed, but the old graveyard was occasionally used, and was never abandoned or given up.

“Heritors,” said Lord Adam, “hold the churchyards in trust for the parishioners, and are bound to see that they are administered for the purposes for which churchyards were instituted by the law of Scotland. I think the heritors have the fullest right of administration in connection with the churchyards and the tombstones which may be erected in them. They can prevent even the erection of a mausoleum if they think fit, or anything that interferes with the free use of the churchyard. But it is quite a different matter to say that the whole of the heritors can combine together—or that one can do it with the approval of the others—to use the churchyard for purposes foreign to it. No consent of the whole heritors can authorise such a step, because that would be a breach of trust, and that is really what this case comes to. If it is a breach of trust, then I hold that the parishioners, and I should think also those parties having land in the parish, although they may not at the moment reside in the parish, would be entitled to interfere; they are entitled to do so if there is a mis-

Tombstones
or mauso-
leums.

use by the heritors as trustees of the property under their charge" (8 R., at p. 1028).

No one had a right to erect a tombstone or monument of any kind without the heritors' permission (*M'Bean v. Young* (Elgin), 1859, 21 D. 321), and its design should be approved by them or a committee of their number.⁴ The reason for this is twofold: (1) the preservation of the reverent and decent aspect of the place; (2) to guard against the intrusion on the plot by persons other than those to be commemorated, or the undue occupation of ground suitable for interments to the effect of reducing the usual area. The erection of elaborate monuments in parish churchyards is to be deprecated, if only because if such a monument fall into a state of disrepair, and the representatives of the person commemorated by the monument are unwilling or unable to pay for its restoration, or cannot be traced, no liability for its upkeep can attach, it is thought, either to the heritors or to any other parochial authority; and the seemingly aspect of the churchyard is liable to be disagreeably affected by masses of decaying stone, with undecipherable inscriptions.

The custom of erecting any tombstones, indeed, is sanctioned rather by custom than by expressly defined right.

That a tombstone has remained on a graveyard for a considerable period has been held to sanction its remaining there, even though not erected by the nominal owner of the lair.

⁴ See the passage quoted *supra* from the opinion of Lord Adam in the *Tulliallan* case; but with this compare that quoted from Lord Benholme's judgment in *Hill v. Wood*, *supra*, p. 220, where, speaking of the right of property in a burial-place, he says that "It includes . . . the right . . . of adorning them with such monuments as they may be inclined to erect to the memory of the dead" (M. 373). The parish council now holds the transferred churchyards "for the same purposes and subject to the same rights for and subject to which" they were "held by the heritors" (Local Government Act, 1894, sec. 30 (6), and Property and Endowments Act, 1925, sec. 32 (1)). They may sell rights of burial under sec. 32 (2). In regard to such rights the powers of the purchaser in regard to monuments, &c., will depend on the terms of the contract of sale.

A mother erected, in memory of her son, in the Allanvale cemetery, parish of Old Machar, Aberdeen, a tombstone on his grave, the ground for which had been purchased with his own funds. The stone was erected without consulting the deceased's brother, his sole next-of-kin and executor (who had taken the receipt for the lair in his own name), two years after the death. Two years after the stone had been erected the brother removed it. It was held that the mother was entitled to have the stone restored (*Wright v. Wright* (Old Machar), 1881, 9 R. 15). In this case Lord Young said, "We are not required to enter on the question whether the mother could, in a question with him, have established a right to erect the stone" (p. 17). In the recent case of *Macrae's Trustees v. Lord Lyon King-of-Arms*, 1926 Session Notes, 91, the Lord Lyon having made an order requiring the late Sir Colin Macrae to remove certain armorial bearings which he had caused to be carved on a tombstone erected by him in the churchyard at Kilduich, Kintail, Sir Colin raised an action challenging the decree of the Lord Lyon as *ultra vires*. On his death, his trustees continued the action, and pled that the Lyon had no power to order the removal of arms from heritable subjects, and, moreover, that the tombstone had been built into the fabric of the church which belonged to the heritors and that the respondent in the Lyon Court proceedings could not interfere with it. The Lord Ordinary (Constable) dismissed the action as irrelevant. He expressed the opinion that the fact that in practice the Lord Lyon ordered the removal of unlawful arms, whether on moveables or heritage, was sufficient to establish that he had a right to do so.

Where authority is sought to disinter a body, it is usual to apply to the Sheriff of the county in which the churchyard is situated. There is a form for such a petition in Lees' "*Sheriff-Court Styles*," 3rd edn., p. 161. In *Mitchell, Petitioner*, 1893, 20 R. 902, the First Division remitted such a petition to the Sheriff,

Authority
required for
disinterment.

“to inquire into the facts set forth in the petition, with power to proceed as shall be just.”⁵

Heritors were not entitled to charge for lairs (*Town of Greenock v. Stewart*, 1777, 2 Hailes, 759). The kirk-session occasionally made a charge under the name of charge for the use of mort-cloths. If by long custom this payment was recognised and admitted in a parish, the money received by the kirk-session must be applied to the relief of the parish poor (*Kirk-Session of South Leith v. Scott*, 1832, 11 S. 75; but see also *Wilson v. Brown* (Muckhart), 1859, 21 D. 1060).

Payment for mort-cloths.

How applicable.

By the Ancient Monuments Consolidation and Amendment Act, 1913, the owner of any monument which appears to the Commissioners of Works to be an “ancient monument” within the meaning of the Act may, with the consent of the Commissioners, constitute them by deed guardians of the monuments (sec. 3, sub-sec. (1)); and similarly the owner of any monument which appears to a local authority to be such an ancient monument, and is situated in or in the vicinity of their area, may with the consent of the local authority constitute them by deed guardians of the monument (sec. 3, sub-sec. (2)). When such guardianship is accepted, the Commissioners, or local authority as the case may be, become chargeable with the duty of maintaining the monument. “Ownership” for the purpose of the Act seems to depend on the ownership of the land on which the monument stands (sec. 5). Heritors are not expressly included as “Owners”; and it seems doubtful whether they come within the description in sec. 5 (1) (d) of “trustees for ecclesiastical . . . or other public purposes

3 & 4 Geo. V. c. 32.

Protection of ancient monuments.

Guardianship by Commissioners or local authority.

⁵ The mother of an illegitimate child *forisfamiated*, who had been buried by friends who had a charitable interest in her, presented a petition to the Sheriff to have the body disinterred and buried elsewhere. It was held she had no title to sue (*M'Gregor, Petitioner*, 1898, Sheriff Court of Inverness-shire, 15 Sh.Ct.Rep. 38). See also *Black v. M'Callum and Others*, 1924, 40 Sh.Ct.Rep. 108, where claim to disinter was negatived owing to want of relationship and because of special clauses in the lair certificate providing of disputes being disposed of by a committee of the parish council.

Commis-
sioners or
local author-
ity may
purchase or
accept gift
of right in
an ancient
monument.

entitled in the case of freehold . . . land in fee," regard being had to the terms of sec. 5 (3), by which the expression "entitled" means "beneficially entitled." But under sec. 1 the Commissioners or any local authority may purchase any such monument as is above defined; and by sec. 2 "ANY PERSON" may by deed or will give or devise or bequeath to the Commissioners of Works or to a local authority all such estate or interest in any ancient monument as he may be seised or possessed of, and the Commissioners or authority may accept such gift, devise or bequest if they think it expedient to do so. Moreover, the Commissioners or local authority may by sec. 9 enter into any agreement with the owner of any monument of which they have become the owners under the provisions of the Act *or with any other person* as to the maintenance and preservation of the monument and the cost thereof. The term "monument" includes any structure or erection other than an ecclesiastical building which is, for the time being, used for ecclesiastical purposes; and the expression "ancient monument" includes any monument specified in the Schedule to the earlier Ancient Monuments Protection Act, 1882—(which, with the exception of the Schedule, was repealed by the Consolidating Act of 1913) and any other monuments or things which in the opinion of the Commissioners of Works are of a like character, "and any monument or part or remains of a monument, the preservation of which is a matter of public interest by reason of the historical, architectural, traditional, artistic, or archæological interest attaching thereto, and the site of any such monument or any remains thereof . . . and also includes the means of access thereto" (sec. 22). That a monument in a churchyard may fall within this description is shown by the fact that in the unrepealed Schedule to the Act of 1882 one such monument is included, viz., "The cross slab with inscription in the churchyard at St. Vigean."

Where a churchyard transferred under the provisions of the Property and Endowments Act, 1925 (hereinafter noticed), to a parish council surrounds or adjoins any church or other ecclesiastical building vested in any body holding the same in trust for, *inter alia*, preservation as an ancient or historic monument, the churchyard shall be held subject to a right of access to any person who may resort thereto for the purpose of inspecting or repairing the church; and the road or path through the burial-ground shall be kept in good and sufficient repair by the parish council (Act of 1925, sec. 32 (1) (a) and (c)).

Right of access through transferred churchyard which surrounds or adjoins any church, &c., which is an ancient monument.

Burials in a church are not regarded as legal (*Hamilton v. Heritors of Linlithgow*, 1817, Connell on Parishes, Suppl., 107; *Kirk-Session of Duddingston v. Halyburton* (Duddingston), 1832, 10 S. 196, footnote at p. 198; Erskine, Principles, Bk. i. tit. iv. sec. 8, footnote t. (49), 1886 edn.). (See Acts of Assembly, 1588 and 1643.) Where, as in Glasgow Cathedral, the building is under the care of the Commissioners of Woods and Forests, permission is occasionally obtained from them for an interment. There is no statutory prohibition of such interments, but heritors without doubt exercise a right discretion in refusing permission for interments in churches.⁶

Burials in a church.

When the churchyard had become overcrowded, the heritors might (and the parish council as now coming in their place may) resolve to enlarge it or to obtain a new place of interment.⁷ The former is preferable, as, apart from all other considerations, the nature of the ground is likely to be similar to that of the existing graveyard. If ground contiguous is not

Enlargement of churchyard or provision of new one.

⁶Great difficulty was experienced by Presbyteries in enforcing observance of the Acts against burial in churches. (See "The Presbyterie Book of Kirkcaldie," at pp. 252, 274, and 290.)

⁷Heritors were not bound to extend a churchyard if there were a considerable portion which, though allocated, was not yet used nor likely to be used. "The heritors could allot this unused ground for the needs of new parishioners" (per Sheriff Lees in *Heugh v. Airth Heritors*, 1903, 19 Sh.Ct.Rep. 163, at p. 166).

obtainable at a reasonable cost, or is geologically unsuitable by reason of its rockiness or dampness, it is necessary to look elsewhere. The soil sought for should be dry (*Town of Greenock v. Stewart* (Greenock), Mor., Kirkyard; Appendix 1). It should be as conveniently situated to the church as possible. The extent of the ground for either an enlarged or a new churchyard can only be ascertained by a calculation of the average rate of mortality of the parishioners. A heritor in a landward parish, a portion of whose land was designated for churchyard purposes, appears to have been entitled to relief from his co-heritors according to the valued rent of their respective properties; but there is no decision on the point. It has been suggested that in the case of burghal-landward parishes a reasonable and just rule of relief would have been to allocate among the heritors *inter se*, on the one hand, and on the urban community on the other, according to their respective real rents, the price of the ground provided, in proportion to the extent to which each individual heritor on the one hand, and the urban community on the other, obtained or required an allocation of the ground, deducing this rule from the principle of assessment adopted by the House of Lords in 1802 in deciding the *Peterhead* case regarding the rebuilding of a church (*Harlaw v. Merchant Maiden Hospital*, H.L., 1802, 4 Paton, 356).

An extended or new graveyard might be designated by the Presbytery, or by constructive designation, such as use for forty years, or a clear intention to destine it for the burial of parishioners. (The case of *The Laird of Philorth v. Heritors of Rathan*, 1666, Mor. 5620, may be consulted.) When the Presbytery has pronounced a designatory deliverance, a copy of this, duly certified, ought to be preserved among the records of the kirk-session.

Competency
of excambion.

An excambion might be effected, and there seems no reason to doubt that this may still competently be

done by the parish council coming in place of the heritors as a body; a heritor giving a portion of ground and taking the old graveyard in exchange. But the old graveyard must not be used for secular purposes. "No one has a right to break up the ground of interment to the remotest period of time. There the dust must for ever remain" (*Wright v. E. of Mansfield* (Scone), H.L., 1824, 2 Sh.App. 104).

The law as to the excambion of churchyards was discussed in the *Rothesay* case. There the heritors had executed a contract of excambion, by which they conveyed to one of their number, subject to certain conditions as to access, a ruined chapel, situated in the middle of the parish churchyard, which had, from time immemorial and until recently, been used as a place of sepulture, together with the *solum* upon which it stood, in exchange for a large piece of ground contiguous to the churchyard. It was held that the conveyance was *ultra vires* (*Russell, &c. v. Marquess of Bute*, 1882, 10 R. 302).

The Lord President (Inglis) observed, "I am not to be understood as saying that an excambion or exchange of a portion of a churchyard for other more convenient and more extensive ground, with a view of improving the churchyard, will in all cases be unlawful. I can quite understand circumstances in which such an excambion might be very properly carried out by the heritors. For example, if there was a portion of the churchyard inconveniently situated for the purpose of burial, and which had not been used for burying for a very long period—say, for a century—and additional land elsewhere was offered in exchange for it—by which I mean on the other side of the churchyard—I am by no means prepared to say that the heritors might not lawfully make such an exchange. Or supposing that there was ground embraced within the walls of the churchyard which never had been used for burying purposes, and was not well suited for the purpose, there again an

exchange for other and more suitable ground would, I think, be within the power of the heritors" (*ibid.*, pp. 309, 310).

Lord Shand pointed out that had the heritors allocated to Lord Bute the ground referred to as a place of sepulture; this would in his view have been quite competent, and any objection would have been met by the fact of the addition to the burying-ground.

In *Bain v. Lady Seafeld* (Duthil), 1884, 12 R. 62, and 1887, 14 R. 939, an excambion of the site of a church, the churchyard, and glebe by the minister, with consent of the Presbytery to a heritor, was held to be invalid so far as it bore to excamb the site of the church and churchyard without the consent of the heritors.

Distinction
between
public paro-
chial burying-
ground and a
cemetery
opened by
private
enterprise.

There is a broad distinction between a public parochial burying-ground, whether attached to the parish church or in some other situation, and a cemetery, which, although in one sense public, is established by private parties for their own profit and emolument.

Individual
rights in
latter depend
on contract.

None of the statutes cited "apply to the case of a cemetery established by private parties, and the common law rules regarding parochial burying-grounds seem only applicable to the case of a cemetery, in so far as they form part, or may be held to form part, of the contract entered into between the proprietors of the cemetery and those who purchase lairs or the right of interment therein. Indeed, the whole rights, whether of proprietors or of lairholders, in a cemetery may be said, with strict accuracy, to arise *ex contractu*, the one party giving and the other receiving exactly what is bargained for, and nothing more" (Lord Ordinary (Gifford) in *Cunningham et al. v. Edminston et al.*, 1871, 9 M. 869).

Private
burial
grounds.

Private burial-grounds are not unusual in Scotland. They are not reckoned *inter res religiosas* (Craig, "*Jus Feudale*," l. i. dieg. 15, sec. 11; Bank, i. 3, 12). Where the burial-ground is within an

estate, it is usual, in any disposition of the lands, to insert a clause declaring the burial-ground to be the inalienable property of the disponent, and reserving right at all times to him and his heirs to obtain access for interments or otherwise. In the case of *Scone*, an action to enforce right to access originated in a summary petition to the Sheriff (*Wright v. Mansfield*, 1824, 2 Sh.App. 104).

TRANSFER OF A GRAVEYARD TO A PARISH COUNCIL
UNDER THE LOCAL GOVERNMENT (SCOTLAND) ACT,
1894. SEC. 30 (6).

Under this Act the heritors of any parish were empowered to transfer the property of any churchyard which they held to the parish council; and the parish council, if they accepted such transfer, thereafter held such churchyard for the same purposes and subject to the same rights for, and subject to which it was held by such heritors; and the council have and may exercise and perform all the powers and duties before such transfer vested, in or imposed on such heritors in relation to the churchyard transferred (except any power or duty of enlarging or extending such churchyard and assessing for the cost of such enlargement or extension)—provided that the costs of maintenance and management of such churchyard after such transfer shall if and so far as they require to be defrayed out of any rate, be a charge upon the poor rate: and provided also that such transfer shall not alter or transfer any liability to assess for the repayment of any debt or the incidence of any assessment levied for such repayment. After such transfer the powers and duties transferred were no longer to be exercised and performed by such heritors. As will appear in the sequel, under the Property and Endowments Act, 1925, provision is made for automatic transfer of parochial churchyards to parish councils to the same effect as if they had been transferred under

Provisions for
voluntary
transfer to
parish council
under Local
Government
Act, 1894.

this section of the Local Government Act, 1894, but with more extensive powers to the parish councils (*infra*, pp. 247, &c.).

Had heritors sole right in case of pre-Reformation churchyards? or did minister and kirk-session have rights therein?

Advantage of the provisions of the Act of 1894 was taken in many parishes prior to the passing of the Act of 1925. In connection with such transfers, a question of interest sometimes arose as to whether in the case of parishes in which the graveyard was in use before the Reformation the heritors were the sole custodiers, or whether the minister and kirk-session had any say in the matter.

Pre-Reformation position of churchyards.

Many churchyards were unquestionably in use for the interment of parishioners long prior to the Reformation. At that time the churchyards of parish churches were regarded as the property of the local clergy, and fees were paid them for interment. Such is still the law of the Church of England. The position of the question in the Church of Rome may be judged of from Smith's "Elements of Ecclesiastical Law" (adapted specially to the discipline of the Roman Catholic Church in the United States, but containing a sound digest of Romish law and practice). 1887, p. 434. "Rights of parish priests relative to funerals.—The rights on this head may be reduced chiefly to two—namely, the right—1, to bury or have a burying-ground (*jus sepeliendi*); 2, to receive certain emoluments or burial dues (*jura funeraria*)," &c., &c.

After the Reformation we find provision made for the upkeep of pre-Reformation graveyards in Scotland in the Act 1563 (c. 76 in 1682 edn. of statutes; c. 12 in Thomson's Statutes; and in Alexander's Abridgement, see p. 41)—

"It is statute and ordanit for uphalding and reparelling of paroch kirkis and kirk yairdis of the samin for burial of the deid within this realme, that the Lordis of Secreet Counsall put ordure thairto and consult how the samin salbe done and uphaldin tymes to cum" (Thomson, ii. 539; Alexander, p. 41).

The Council appear on 13th September, 1563, to have made an order for "bigging, mending, and reparation of parochie kirkis," but nothing is said about churchyards. This order was ratified by the Act 1572 (c. 54, M. 1682 edn.; c. 15, Thomson's Statutes, iii. 76; Abridgement, p. 50). In 1597 another Act was passed, which "decerns and ordains that all parochineris of everie parochie kirk within this realme, build and repair the kirkyard dyikis of thair awain parochie kirk with stane and mortar to the heiche of twa ellis, and to mak sufficient stillis and enteres in the saidis dyikis to pas to the kirk and kirkyard thereof" (Act 1597 (c. 232, M. 1682 edn.; c. 3, Thomson's Statutes, iv. 131; Abridgement, p. 129)). "Parishioners are, by 1597, c. 232," says Erskine, "ordered to repair the churchyard walls of their own parish, and, 1617, c. 6, they must provide communion cups, lavers, and other utensils necessary for the administration of the sacraments. But now by long custom this burden, at least that of repairing church and churchyard walls, is transferred from the parishioners and parson to the landholders, who must bear the expense of repairing and even rebuilding the parish church according to the value of their respective lands" (Institutes, Nicolson's edn., i. 588, 589). Stair observes (Institutes, More's edn., i. 200)—
 "Kirks and kirkyards are not only allodial without an acknowledgment of a superior, but they are destined for pious purposes, and are ordained to be upheld and repaired (Parl., 1563, c. 76)." If before the Reformation churchyards belonged to the Church, and after the Reformation they were transferred to nobody, is the property still in the Church, as represented by its local court, the kirk-session, and the minister, as successor of the pre-Reformation parson? Stair says (ii. 3. 39), "They have no casualties which were mortified to the Church which dieth not but abideth as an incorporation," and it might seem that an evidence of this ownership is seen in the parson's right to the present

In whom is
property in
churchyard?

Varying
indications in
judicial *dicta*.

day to cut the grass in the churchyard and to hinder any one else from doing so. Against this, Lord Hailes' view of the law may be cited. In 1777 the Court of Session decided the case of the *Magistrates of Greenock v. Shaw Stewart*, 1777, 2 Hailes ii., 758, and elsewhere, *ut supra*, when it was held that an additional plot of ground for burying-ground must be furnished by the heritors. Lord Hailes reports his own observations as follows:—"This question could never occur in our ancient law; for, as the Popish clergy reaped great emoluments from burying the dead, they were always ready to furnish burial ground. There is no doubt that the churchyard belongs to the heritors, *subject* to the single burden of interring the dead. The grass of it is theirs, and the trees planted in the churchyard are theirs. They have connived at the kirk-session drawing the emoluments arising from what is called layers, because this is applied by the kirk-session for the use of the poor, for whose maintenance the heritors are ultimately liable. I think that the heritors must furnish the ground for an additional churchyard, and that the ground so furnished will continue theirs, and that they will have all the profits arising from it" (Hailes' Decisions, 1826, ii. 758). But this decision is not so authoritative as it at first seems. The parish of Greenock, to the churchyard of which an addition was being made, was *post-Reformation*. (See Connell on "Parishes," 1818, p. 5.) Such a churchyard, as it was provided by the heritors, undoubtedly belongs to the heritors. As to the grass and trees belonging to the heritors, Lord Hailes undoubtedly goes too far. Sir George Mackenzie is said by Brown ("Supplement to Dictionary of Decisions," 1826, vol. v., p. 414) to state this doubt—"Query—To whom a coal found in a churchyard or trees growing there will belong—whether to the heritors, the poor, the patron, or the minister?" Forbes' Institutes, p. 86, says, "*the minister has right during his incumbency to the*

Property in
grass and
trees.

churchyard, and may shear the grass in the churchyard but not cut the trees." Pardovan in his "Collections," p. 174, says, "the only right that ministers have to the grass growing in the churchyard is that they may cause their servants cut it, and hinder others from doing so."

Brown, Supplement v. 414, observes—"It is said that there is a decision of the Court of Session finding that the tree in a churchyard belongs to the heritors, but I cannot find any such collected." He reports a case, *Hay and Low v. Williamson*, Dec. 2, 1778, 5 Br.Supp. 415, which was one between the minister of Arngask and two of his heritors, where it was held "that the minister was only entitled to cut the grass in the churchyard, but not to pasture his bestial thereon, and therefore discharged him from doing so." (See also the case of Old Cambus, *Spence v. Darling and Another*, Dec. 1, 1808, F.C.)

In the recent case of *Mackechnie v. Edrom Parish Council*, 1926, 43 Sh.Ct.Rep. 147; 1927 S.L.T. (Sh.Ct.) 49, in the Sheriff Court of Berwickshire, it was held by the Sheriff (Chisholm, K.C.) (1) that the minister had at common law the right to the grass on the parish churchyard; (2) that this right was not extinguished by the statutory transfer of the churchyard to the parish council under the provisions of the Act of 1925 (see *infra*, pp. 247, &c.); but (3) that the minister's right to the grass did not entitle him to insist on its being allowed to grow to full maturity, the parish council having right to cut the grass as often as might be reasonably necessary in discharge of their duty of care and maintenance of the churchyard.

Mr. Nicolson, in a note (d) i. 589, to the paragraph cited above from Erskine's Institutes, says, "the management is in the hands of the heritors, *subject, however, to a control*, the extent of which is not well ascertained, by the Presbytery, and ultimately by the

Court of Session." It has been suggested that the radical right of ownership in the ground may possibly be regarded as belonging to *the Church*, vested in the body of heritors, or the kirk-session, acting as guardians, to protect and administer the subject, taking *Cunningham v. Alex. Cunninghame* (Currie), 1778, 5 Br.Supp. 415, as an authority for the view. This was a case between Cunningham and his relatives as to Cunningham's right to cover his wife's grave with a gravestone. The relatives objected, on the ground that it amounted in effect to withdrawing so much of the ground from being employed for the purpose of burying.

Nature of
heritors'
right.

After sundry procedure, Lord Covington remitted to the Sheriff with the instruction "that he finds that the property of the churchyard, as of the church itself, belongs to the heritors having property lands in the parish as part and pertinent of their property lands, *for the interment* of those in their respective families and other inhabitants upon their several properties; and those who neither are heritors nor reside within the parish have no right to be buried, or to bury those of their families who did not reside in the parish, in the church or churchyard without the consent of the heritors" (*ibid.*, p. 416). See also *Kirk-Session of South Leith v. Scott*, 11 S. 75, at p. 78, where Lord Medwyn said, "It is only since the Reformation that the burden of maintaining churches and churchyards, and furnishing additional ground for the latter, where necessary, has been laid upon the heritors, and they have, in consequence, come to have a right *of a qualified nature* in these subjects." In *Wright v. Mansfield* (Scone), 1824, 2 Sh.App. 104 (not rep. in C. of S.), it appeared that authority had been obtained from the Presbytery of Perth in 1784 to remove the church and the churchyard of the parish of Scone, situated on the Moothill, belonging to Lord Stormont. A new church having been built elsewhere, surrounded by a

piece of ground which was enclosed and used as a churchyard, authority was again obtained from the Presbytery to take down this church and build it in another part of the parish. In this action, raised to vindicate a right of access to the last-mentioned burial-ground, Lord Craigie remarked, p. 107, "From 1784 to 1804 every person dying in the parish had right to be buried there; but in that year a new churchyard was furnished, and the ground of the former one being no longer occupied, returned to the Earl free and unburdened, excepting that it should not be disturbed till the remains of the bodies there interred should have returned to their original dust."

As possibly incidental to the rights of *quasi*-ownership of the *kirk-session* in a churchyard, reference may be made to the monopoly enjoyed by the kirk-sessions in keeping mort-cloths and letting them out for hire for use within the parish. (See *Minister, &c., of Kippen*, 1756, Mor. 8013, and *Kirk-Session of Dumfries*, 1783, Mor. 8018.)

In recent cases the *monopoly of ownership* by the heritors has not been recognised by the Court, though it has been repeatedly claimed. Thus the heritors of Muckhart pled in 1859 that the churchyard was "under the management of the heritors, who had the sole power to regulate its use" (21 D. 1061); but Lord Wood, in giving the decision of the Court, was general in his remarks, viz., "that the heritors *have a large superintending power* and control in the distribution of lairs in the parish churchyard, so as to make it available for the use of the parishioners, . . . cannot be disputed. But it is unnecessary to inquire with any anxiety, or to define with precision the limits of their power, because in the present case, if it be the fact," &c. (*Wilson v. Brown*, 1859, 21 D., at p. 1064). As to a conveyance granted by heritors being *ultra vires*, there is the *Rothsay* case of *Russell v. Lord Bute*, Dec. 8, 1882, 10 R. 302, where Lord Kinnear, as Lord Ordinary, said,

Monopoly of ownership in heritors negatived.

pointedly, “ *the heritors are not proprietors of the churchyard* in any sense which will enable them to give to others a feudal right of property in the *solum* of the whole or any part of it. They are *administrators* of the churchyard for parochial purposes. But they hold it as trustees, and the alienation of a part of it appears to me to be a breach of trust.” The graveyard of Rothesay is pre-Reformation. On the other hand, Lord President Inglis observed in *Steel v. Kirk-Session of St. Cuthbert's*, 18 R., at p. 917, “ the position of the kirk-session in regard to the church and burying-ground of any parish in Scotland may be described as administrative merely. But the position of the heritors is different. They are the proprietors of the church and of the churchyard.”

Opinion by
Sir John
Rankine,
Q.C., on
question of
difference
between pre-
Reformation
and post-
Reformation
churches.

A memorial for the opinion of the late Sir John Rankine, Q.C., Professor of Scots Law in the University of Edinburgh, was submitted on behalf of the minister and kirk-session of a parish the graveyard of which was in use before the Reformation, and counsel's opinion was asked on the following points:—1, Does a distinction exist in law between the ownership or administration of *pre*-Reformation and *post*-Reformation churchyards? 2, Do the heritors of a parish having a *pre*-Reformation churchyard “ hold ” such churchyard exclusive of the parish minister and (or) the kirk session, and can they, without the consent of either the minister or kirk-session, transfer such a churchyard to a parish council? 3, Heritors, not being a corporation, can they validly convey a graveyard, without the consent of their whole number? 4, In the event of the churchyard of A being transferred to the parish council, what rights of administration over the churchyard would belong to the minister or kirk-session, and what would be their remedy if such rights were not admitted by the parish council?

Permission was kindly given by Sir John Rankine to print his opinion which was as follows:—

1. It is, I think, the fair, though not the only possible, reading of the opening words of the Local Government

Act, 1894, sec. 30 (6), that the Legislature assumed the property of the churchyard of every parish in Scotland, which possesses a churchyard, to belong to the heritors of the parish in trust for certain well-known purposes. It is, moreover, in my opinion, clear from a consideration of the authorities referred to in almost exhaustive detail in the memorial that the question, whether the ownership of the heritors extends to pre-Reformation as it undoubtedly does to post-Reformation churchyards, has not been raised in any recorded form; and that in practice no distinction, springing from the date of their origin, has been made in regard to the management of churchyards by the heritors. It may, nevertheless, be true that such a distinction does and ought to exist; and the history of the ownership of churchyards is so obscure that in my judgment the memorialist has acted only in the exercise of ordinary prudence and caution in seeking legal advice before allowing a transfer to take place which must be irrevocable and may be fraught with important consequences to the parish. I have found the question to be attended with much difficulty; but in the end I have reached the conclusion that the first query put to me falls to be answered in the negative.

It is, I think, a principle of our law that no land in Scotland can be without an owner, even if it be a *res sacra* or *res religiosa*. Again, there seems to be no trace in historical times of lands or other heritages in Scotland being held by the church as a corporation directly in property: so-called church property has all along been held in each locality by a local trustee or by local trustees. Further, I think that, not only in the canon law, but also in our municipal law, as well as in that of England, the churchyard—as its name indicates—has all along been regarded as an adjunct of the church, and governed by similar rules in so far as difference of physical constitution and the use to which they were respectively dedicated would allow. It is, I think, well established that church and churchyard in pre-Reformation times belonged (subject to certain religious trusts and to certain ecclesiastical supervision) to the rector of the parish; and of this the present right of the stipendiary minister to cut and take away the grass growing in the churchyard may be a modern reminiscence. It is certain that for a long period after the Reformation rectors or “parsons” still existed, though the active incumbent came in most cases to be a stipendiary; and that it was not till 1690 that “parsons” finally disappeared by force of an Act of Parliament. There is, so far as I am aware, no distinct authority in regard to the mode in which “parochiners” came to undertake the whole burden of maintaining the parish

churches, which burden had theretofore been shared with them by the parson, whether an individual or a religious house; or as to the time at which these "parochiners" were fixed down as the body, which came to be known as the heritors of the parish. But in some way a change took place, and with it arose the co-relative rights of the heritors in the whole area of the church. In my opinion the transfer of the churchyards must be presumed to have marched *pari passu* with the transfer of the churches. And it is not surprising that no documentary trace of the process now exists, seeing that both subjects are exempt from the feudal law and might pass without charter or sasine. In addition to the authorities cited in the memorial, I may refer to the Act 1640, c. 20,⁸ Thomson's Acts, V. 278 A.; *Ure*, 6 S. 916; *Wright*, 8 R. 1025; *Bain*, 12 R. 62; *Fraser*, 21 R. 278.

2. I think so, for the reasons given above.

3. The body of heritors has in many, perhaps in all respects, the privileges of an administrative and an executive body. In particular it speaks through a majority voting at a properly called meeting, and it is not necessary that there should be unanimity. It suffices that the resolution came to is not *ultra vires* (*Boswell*, 13 S. 148). In the present case this proviso does not arise, seeing that direct parliamentary authority can be pleaded for anything the heritors may do within their statutory powers.

4. I am not aware that a kirk-session has ever had any direct control over or part in the administration of the churchyard. It is true that the servant of the kirk-session has not uncommonly the care of the ground entrusted to him so far as manual labour on it is concerned. But this is purely by a delegation which might at any time be withdrawn. Ever since the Reformation, the proper protector of the ground, in the interests of religion and decency, has been the bishop or the Presbytery of the bounds. So that if the minister or an elder or any parishioner were to be dissatisfied with some illegal inversion of the uses to which a churchyard can alone be put, his proper course would be to put the Presbytery in motion, and also in case of emergency to seek interdict in the Sheriff Court or suspension and interdict in the Court of Session.

The Opinion of
(Signed) JOHN RANKINE.

EDINBURGH, 1st November, 1897.

⁸ The Act referred to was rescinded with others of its year at the Restoration; but rescinded Acts may be referred to, not as law, but as evidence of practice.

The contingency of the property of a churchyard being held to be in a kirk-session in any case is provided for in sec. 32 of the Property and Endowments Act, 1925, by a provision, noticed hereafter, p. 250, making the provisions of that section, and the incorporated sub-sec. (6) of sec. 30 of the Local Government Act of 1894 applicable as if the kirk-session were named therein instead of the heritors.

Provision in Property and Endowments Act for case of property being held by kirk-session.

The transfer by the heritors under the Act of 1894 was sufficiently effected by a minute of meeting resolving and purporting to make such transfer, duly intimated to and accepted by the parish council, whose letter of acceptance should be engrossed in the minute-book of the heritors.

Modus of transfer by heritors.

That the area of a graveyard had become exhausted might be recognised by a resolution of the heritors, or by direction from the Presbytery to the heritors to provide a new graveyard. But by the provisions of the Burial Grounds (Scotland) Act, 1855, another method of procedure became lawful. As the powers of this Act are now exerciseable by parish councils, to which parochial burying-grounds have been transferred under the provisions of the Property and Endowments Act of 1925, it is convenient here to deal with the provisions of this latter Act before examining those of the Act of 1855.

Exhaustion of existing area : enlargement.

18 & 19 Vict. c. 68.

15 & 16 Geo. IV. c. 33.

PROVISIONS OF THE PROPERTY AND ENDOWMENTS ACT, 1925, AS TO TRANSFER OF CHURCHYARDS.

These are contained in secs. 32 and 33 of the Act, and are as follows:—

32.—(1) The property of ANY CHURCHYARD heretofore held by the heritors of any parish shall as at and from the passing of this Act by virtue of this Act and without the necessity of any further conveyance BE TRANSFERRED FROM THE HERITORS AND VESTED IN THE PARISH COUNCIL to the same effect as if the churchyard had been as at that date transferred by the heritors

Transfer of parish churchyards. 57 & 58 Vict. c. 58.

to the council in pursuance of subsection (6) section thirty of the Local Government (Scotland) Act, 1894: Provided that due regard and respect shall be had by the parish council to the memory of the dead and the wishes of their relatives before any ground already allocated as a burial ground shall be treated as being vacant and unoccupied ground and re-allocated by the parish council as the burial place for another family or for the interment of another body: Provided also that in addition to the powers and duties by the said subsection transferred from the heritors to the parish council the power or duty of enlarging or extending the churchyard and assessing for the cost of such enlargement or extension shall also be so transferred and for the purpose of providing ground for such enlargement or extension or additional accommodation in a suitable and convenient situation, the parish council shall have and may exercise all the powers relating to the acquisition of land for burial grounds contained in the Burial Grounds (Scotland) Act, 1855, and the costs of providing, maintaining, and managing ground so acquired, so far as they require to be defrayed out of any rate, shall be a charge on the poor rate or the assessment under the said Act of 1855, as the parish council may determine: Provided further that where any churchyard transferred to a parish council by or in pursuance of this Act surrounds or adjoins any church or other ecclesiastical building vested in the heritors or in the General Trustees or in any other body holding the same in trust for the purpose of worship or for preservation as an ancient or historic monument—

Powers of extension, &c., under the Burial Grounds Act, 1855, to be available to parish council.

18 & 19 Vict. c. 68.

Special provisions where churchyard surrounds or adjoins church vested in heritors, &c.

Right of access to congregation, &c.

(a) the churchyard shall be held subject to a right of access to the minister and the congregation attending the church, and such other persons as may resort thereto for the purpose of public or private worship, or of inspecting or repairing the church, or for any other lawful purpose; and

- (b) no funeral shall be allowed to take place during the usual time of the ordinary services in the church; and Funerals forbidden during hours of service.
- (c) any road or path through the burial ground shall be kept in good and sufficient repair by the parish council; and Repair.
- (d) where the use of part of the churchyard is required for the enlargement or repair of the church it may be so used in any case where it might lawfully have been so used if this Act had not been passed and subject to the like conditions and restrictions, and where used for the purpose of the enlargement of the church the part so used shall thereupon vest in the heritors or the General Trustees or other body holding the church as aforesaid. Use of churchyard for enlargement, &c., of church.

(2) The provisions relating to THE SALE OF THE RIGHT OF BURIAL contained in section eighteen of the Burial Grounds (Scotland) Act, 1855, shall apply to any churchyard transferred to a parish council by or in pursuance of this Act, and to any enlargement or extension thereof. Sale of rights of burial.

(3) Where the powers and duties conferred and imposed by the Burial Grounds (Scotland) Act, 1855, are exercised and carried out BY A LOCAL AUTHORITY OTHER THAN THE PARISH COUNCIL, the foregoing provisions of this section shall, with the necessary modifications, have effect as if that authority were named therein instead of the parish council, and any expenses of the local authority due to the operation of this section shall be defrayed in the same manner as expenses under the said Act of 1855. Where in any parish the powers and duties conferred and imposed by the said Act of 1855 are carried out BY MORE THAN ONE LOCAL AUTHORITY, this subsection shall be held to refer to the local authority carrying out the said Substitution of other local authority in certain cases.

powers and duties within the district where the churchyard is situated.

Provision for care of property being in kirk-session.

(4) Where the PROPERTY OF A CHURCHYARD IS HELD BY THE KIRK SESSION of the parish the foregoing provisions of this section shall, with the necessary modifications, have effect as if the kirk session were named therein and in subsection (6) of section thirty of the Local Government (Scotland) Act, 1894, instead of the heritors.

Closed churchyards.

For the case of a churchyard which has been, or which may hereafter be closed, special provision is made in sec. 33 (5), the terms of which are given *infra*, p. 253.

Preservation of monuments, &c., in churchyards.

Careful provision for the preservation of monuments, &c., in churchyards is made by sec. 33 as follows:—

33. For the preservation and maintenance of any family burying ground, or enclosure, tombstone, monument, or other memorial to the dead, IN ANY PARISH CHURCHYARD OR PARISH CHURCH, any person who, in the case of a parish churchyard, satisfies the parish council or other body to whom the parish churchyard or the control thereof is transferred, and in the case of a parish church satisfies the General Trustees that he has an interest in such burying ground, enclosure, tombstone, monument, or other memorial, on the ground of relationship to the deceased person or persons therein buried or thereby commemorated, shall be entitled, with the approval of the parish council or other body to whom the parish churchyard or the control thereof is transferred, or the General Trustees, as the case may be, to provide for the preservation and maintenance of the same.

Provisions of 18 & 19 Vict. c. 68, and 57 & 58 Vict. c. 58, which are now available to parish council, &c.

It is now appropriate to revert to the provisions contained in the Burial Grounds (Scotland) Act, 1855 (as modified by the Local Government (Scotland) Act, 1894). These so far as they concern the ENLARGEMENT AND EXTENSION OF BURYING-GROUNDS or the providing additional accommodation for burial, one now, as has

been shown, available to a parish council or other local authorities in which a parochial churchyard is vested under the Act of 1925.

For the purposes of the Act of 1855, parishes are divided into two classes—

Twofold
division of
parishes in
Act of 1855.

- (1) Parishes partly within and partly without the limits of a burgh sending or contributing to send a member to Parliament.

- (2) Other parishes.

In the first class, which necessarily includes all burghal-landward parishes, any two members of the parochial board of the parish (now the parish council), or any ten members assessed for relief of the poor within such parish, or any two or more householders residing within one hundred yards of any burial-ground (or proposed burial-ground) within such parish, may apply to the Sheriff of the county in which the parish or the greater part of the parish is situated, to have it determined whether the parish is within or without the limits of the burgh for the purposes of the Act, which the Sheriff may do after giving notice by advertisement in the *Edinburgh Gazette*, and such newspapers of local circulation as he may deem fitting; and, after hearing any parties having interest, the Sheriff's interlocutor is declared to be as valid as if set forth in the Act. It is not competent to make any new application to the Sheriff for his determination in respect to a parish till after the lapse of five years from his last interlocutor (sec. 3).

(1) Parishes
partly within
parliamentary
burgh.

Closing of
churchyards.

In the second class, any of the parties mentioned above in the foregoing section may present a petition to the Sheriff of the county within which a burial-ground or proposed burial-ground is situated, setting forth that a burial-ground within such parish or such distance (*i.e.*, 100 yards of petitioning residents)⁹ is or may be dangerous to health, or offensive or contrary to decency. The Sheriff shall thereupon fix a day, not less than ten nor more than twenty days after

(2) Other
parishes.
Closing of
churchyards.

⁹ See *infra*.

such petition is presented, for inquiring into the allegations of the petition, and appoint intimation to be made by advertisement in the *Edinburgh Gazette*, and in such newspapers of local circulation—(not necessarily local newspapers, if it is thought others are likely to be as fully circulated in the locality referred to in the petition; but *prima facie* local newspapers are the most suitable). On hearing the petition the Sheriff will permit all parties whom he judges to have an interest to appear and be heard in such manner as he shall deem fitting, and if, on such hearing, he is of opinion that any of the allegations in the petition are true, he will pronounce an interlocutor to that effect, and transmit a copy to one of the principal Secretaries of State. For circumstances in which it was held that a churchyard was offensive, and contrary to decency, and ought to be closed, see *Petition, Ayr Town Council*, 1889, 7 Sh.Ct.Rep. 196. It is not competent to present another such petition (with reference, that is, to the same ground), except with concurrence of the procurator-fiscal,¹⁰ till the lapse of five years from the date of any petition,¹¹ to the like effect having been dismissed (sec. 4).¹²

Procedure
for closing
by Order
in Council.

If the graveyard is to be closed, this will be effected by an Order in Council fixing the date of the closure, due preliminary notice being given of the Secretary of State's recommendation as to closure by intimation to the Crown Agent in Edinburgh and the sheriff-clerk of the county in which such burial-ground is situated, and by notice in the *Edinburgh Gazette*, and notice fixed on the doors of the church of, or on some

¹⁰ In the case of a burgh the procurator-fiscal of the burgh under the meaning of the Act, in any other case the procurator-fiscal of the county in which the parish is situated, would be the proper person.

¹¹ *I.e.*, the date of the interlocutor dismissing the petition.

¹² Decree for closing a churchyard reserved certain rights of interment, and particularly right to apply at any time for authority to inter cremated remains (*Provost, &c., of Paisley, Petrs.*, 1901, 18 Sh.Ct.Rep. 273).

other conspicuous place within, the parishes affected, one month before the proposed Order is considered by the Crown (sec. 5). After the date of closure, any person interring, or assisting or permitting any interment, in any such burial-ground (unless a special licence has been obtained from a principal Secretary of State) (sec. 8), is liable, for each offence, to imprisonment for a period not exceeding two calendar months, or to a penalty not exceeding £20 (sec. 6). No Order in Council is to be deemed to extend to any burial-ground used solely by the Society of Friends (in the Act referred to as "the people called Quakers"), or by Jews, or to a private non-parochial burial-ground, unless such ground is expressly mentioned in the Order (sec. 7).

Effect of closing order.

Saving for burial-grounds of Quakers and Jews.

In the case of the churchyard of a parish which has been closed or which has ceased to be used for interment, important rights are conferred on the kirk-session of the parish in which it is situated by the Property and Endowments Act, 1925, sec. 32, sub-sec. (5), which is in the following terms:—

Rights of kirk-session in regard to closed parochial churchyards.

(5)—(a) Where a CHURCHYARD OF A PARISH HAS been closed—

- (i) either before or after the passing of this Act under the Burial Grounds (Scotland) Act, 1855, or as a result of proceedings under the Public Health (Scotland) Act, 1879; or
- (ii) before the passing of this Act by resolution of the heritors on the ground that no accommodation for further interments remains available therein; or
- (iii) by desuetude during a period of twenty years or upwards prior to the passing of this Act;

60 & 61 Vict. c. 38.

the kirk session of the parish may, within ten years after the passing of this Act, in the case of a churchyard which has been closed *before* the passing of this Act, or within ten years after the date of the closing

Kirk-session
may claim
transfer with-
in limited
time.

of a churchyard in the case of a churchyard closed *after* the passing of this Act, intimate in writing to the parish council or other local authority to whom the churchyard has been transferred that the kirk session desire to take over the custody, maintenance, and control of such churchyard, and the parish council or other local authority, as the case may be, shall, on receiving such intimation, transfer the custody, maintenance, and control of such churchyard to the kirk-session, subject always to such conditions (if any) as the parish council or other local authority may appoint with respect to the public right of access to the churchyard free of charge.

But local
authority
may on appli-
cation trans-
fer at any
time.

(b) Where a churchyard of a parish which has been transferred to a parish council or other local authority has been closed, or has ceased to be used for interment, the parish council or other local authority, as the case may be, may at any time, upon the application in writing of the kirk-session of the parish, transfer the custody, maintenance, and control of such churchyard to the kirk session.

Kirk-session
responsible
for mainten-
ance after
transfer.

(c) Where the custody, maintenance, and control of a churchyard have, in pursuance of this subsection, been transferred to the kirk session, the kirk session shall thenceforward be responsible for such custody, maintenance, and control, and for any expense in connection therewith.

Obligation
of parish
council to
provide new
burial-ground
in lieu of
one closed.

When any burial-ground is closed by Order in Council, it is, under the Burial Grounds Act, 1855 (sec. 10), the duty of the parish council forthwith to provide a suitable and convenient burial-ground for the parish, and to make arrangements for facilitating interments therein; if this is not done within six months of the Order, the council, or any ten or more persons assessed for relief of the poor in the parish, or any two or more members of the council, may apply by summary petition to the Sheriff, to have a suitable portion of land designated for the purposes of a burial-ground. The Sheriff will examine such witnesses and make such in-

quity as he thinks proper—keeping a note of the evidence adduced; and, if he thinks fit, he will designate and set apart such portions as he may deem necessary of any lands in the parish suitable for the purpose; such designated portion must not be part of any policy, pleasure-ground, or garden attached to any dwelling-house or nearer than a hundred yards to any dwelling-house, without the consent, in writing, of the owner of such dwelling-house.¹³ Some days, at least, elapse between the Sheriff's intimation of the portion of ground he intends to designate and the actual designation; for ten days' notice must be given to the owner of the lands, that he may be heard for his interest before the designation is actually made. From the Sheriff's judgment an appeal may, within fourteen days of its date, be taken to any of the Lords Ordinary of the Court of Session, whose decision is final (secs. 10, 11). As to the powers of Sheriff or Sheriff-Substitute, and the necessity of strictly observing these in order to the exclusion of other jurisdiction, see Lord Deas's observations in *Fulton v. Dunlop* (Largs), 1862, 24 D. 1032.

Even without an Order in Council closing an old burial-ground, a new one may be provided by the parish council (sec. 9). Upon the requisition in writing of ten or more persons assessed for relief of the poor, or of any two or more members of the parish council, the inspector of poor of any parish not within burgh, or the town-clerk in the case of a parish within burgh, is bound to convene a special meeting of the parish council of the parish for the purpose of determining whether a burial-ground shall be provided under the Act for the parish, and if a majority of such

Or where
necessary on
other
grounds.

¹³ Unless the ground designated is already a cemetery (sec. 11), which may be read to mean a non-parochial burying ground. By the Burial Act, 1906 (Edw. VII. c. 44) as incorporated with the Public Health (Interments) Act, 1879, "one hundred yards" will be substituted for "two hundred yards" as the distance from a dwelling-house within which no part of a cemetery may be made without the consent of the owner, lessee, and occupier of the dwelling-house.

a meeting shall so resolve, a new burial-ground falls to be provided in the same manner as if an old burial-ground had been closed by Order in Council. If the parish council fail to provide a new burial-ground within six months of the requisition, the procedure is the same as in the case where the burial-ground has been closed by Order in Council, viz., by summary petition to the Sheriff (secs. 9, 10).

Power to contract with cemetery company.

Any ground required for forming a burial-ground under the Act, or for making additions to it when formed, may be purchased from a cemetery company, subject to rights in vaults and graves, and other subsisting rights which may have been previously granted in the ground; or, in lieu of providing a burial-ground, the parish council may contract with any cemetery company, or persons having title to the cemetery ground, for the interment in such cemetery or cemeteries, either in an allotted part or otherwise, on such terms as the council may think fit, of the bodies of persons who would have had a right of interment in the burial-ground of the parish had there been one provided (sec. 12).¹⁴

Parish councils may combine to provide common burial-ground.

Parish councils may unite to provide one common burial-ground for the common use, in which case the councils of the parishes will, for the purpose of providing and managing such one burial-ground, and taking and holding land for the same, act as one joint board, with joint office, clerk, &c. (sec. 14).

Power, &c., of administration in parish council.

When the new burial-ground is provided, the "parishioners and inhabitants" (the significance of the former term being apparently thus still further restricted) of each parish have the same rights of sepulture therein as they would have had in their parish burial-ground (sec. 15); and the burdens upon, and liabilities attaching to, the closed burial-ground

¹⁴ By sec. 13 the Land Clauses Consolidation (Scotland) Act, 1845, is, with certain exceptions, declared to be incorporated in the Act. By sec. 25 the provisions of the Cemeteries Clauses Act, 1847, with reference to the protection of the cemetery, are also incorporated.

attach to the new ground, and its revenues are liable for them "in like manner as the revenues of the burial-ground so closed were liable."¹⁵

The parish council has the management, regulation, and control of the burying-ground;¹⁶ it may, with the sanction of the Sheriff, appropriate a part of the ground (formerly not exceeding one-half) specially for sale to parties; they may dispose of the exclusive right of burial, either in perpetuity or for a limited period, and also of the right of constructing any chapel, vault, or place of burial, with the exclusive right of burial therein in perpetuity or for a limited period, and also of the right of erecting and placing any monument, grave-stone, tablet, or monumental inscription in such burial-ground (sec. 18).

Sale of rights of burial.

Right to erect vaults monuments, &c.

The limitation as to the appropriation of not more than one-half of the churchyard has been repealed. By Act 44 & 45 Vict. c. 27, it was provided that the provision in sec. 18 should not apply to any additional burial-grounds provided by the Parochial Board, "if the Sheriff, having regard to the requirements of the parish, or united parish, is of opinion that the said provision should not be enforced." This Act, and the proviso of the 18th section of 1885, were repealed by the Burial Grounds (Scotland) Amendment Act, 1886 (49 Vict. c. 21), on the narrative that "it has been found by experience that it is unnecessary and inconvenient that the power to sell exclusive rights of burial should be limited to one-half of any burial-ground."

Limitation of sale of burial-rights to one-half of area now repealed.

The council may make arrangements for facilitating the conveyance of bodies of the dead to the burial-place (sec. 19), and provide mortuaries, subject to regulation by the Secretary of State (sec. 20, 21); it

To enclose and embellish, &c.

¹⁵ Sec. 16. Properly speaking, there was no revenue derivable from a parish graveyard, and the burden of maintenance was upon the heritors.

¹⁶ See as to these in relation to the cutting of grass in a transferred churchyard the case of *Mackechnie v. Edrom Parish Council*, *supra*, p. 241.

may enclose, lay out, and embellish the burial-ground "in such manner as may be fitting and proper" (sec. 23).

To charge fees.

The parish council may, subject to the Sheriff's approval, charge such fees for interments as they think fit. A printed table showing the fees must be affixed to and at all times continued on some conspicuous part of the burial-ground (sec. 24), generally the gate. Such expenses as are not met by the price of plots sold exclusively, or fees for interment, are raised by assessment levied in the same way, and with the same power, as the assessment for relief of the poor (sec. 26). The council may borrow money, and charge future assessments with the payment of such money and interest, but in addition to the yearly interest, one-twentieth of the principal sum borrowed must be repaid annually, until the whole is discharged (sec. 27). Of course, the interest will be reduced proportionally.

To keep register of burials.

A register book is kept by an officer appointed by the council to the duty, in which shall be registered all burials, distinguishing in what parts of the burial-ground the several bodies are buried; where the burial-ground is used for more than one parish, the register is to be kept or indexed so as to facilitate searches for entries, in such books, in respect of bodies from the several parishes¹⁷ (sec. 31). And it seems advisable that even where the burial-ground is for the exclusive use of a particular parish the register should be indexed.

Private mau-soleum not subject to restrictions of distance from dwelling-house.

It has been held that the provision that no ground not already used as, or appropriated for, a cemetery, shall be appropriated as a burial-ground or as an addition to a burial-ground under the Act, nearer than one hundred yards to any dwelling-house, with-

¹⁷ Such register books, "or copies or extracts purporting to be thereof," are receivable in all Courts as evidence of the burials entered in such register (sec. 31).

out the consent in writing of the owner, lessee, and occupier of such dwelling-house (sec. 11), has no application to the erection of a mausoleum by a private person on ground belonging to him contiguous to a churchyard, as there was no appropriation of ground for a burial-ground, or addition to a burial-ground, under the Act; and interdict was refused against the erection of such a building at the instance of the proprietor of a house situated within one hundred yards of the proposed site (*Bain v. Lady Seafield*, 1884, 12 R. 62).

With regard to the "Schemes" which it falls to the Commissioners under the Property and Endowments Act to prepare under sec. 22 with respect to the burgh churches enumerated in the Ninth Schedule to the Act, it is provided (sec. 22 (2)) that—

Churchyards
of burgh
churches
under Act
of 1925.

Every such scheme shall make provision for—

- (a) the transfer to the General Trustees of all rights of property vested in or belonging to the magistrates or the town council of any of the burghs within which the burgh churches are situated in the fabrics and sites of the burgh churches and of any manses and other subjects connected therewith, and IN CHURCHYARDS CONNECTED WITH THE BURGH CHURCHES, and for the transfer to the General Trustees of the duty of maintaining any property so transferred;

But this is subject to the qualification in the later sub-sec. (4) of the same section that—

The provisions of this Act in regard to the transfer to the General Trustees of all rights of property in any churchyards connected with the burgh churches, and the duty of maintaining any churchyards so transferred, shall not apply to the churchyards of Grey-

Excepted
churchyards.

friars and Canongate in the burgh of Edinburgh, or to the churchyard of St. David's or Ramshorn in the burgh of Glasgow, or to the churchyards of St. Nicholas and St. Clements in the burgh of Aberdeen, which churchyards shall continue to belong to and be maintained by the town councils of the said burghs, respectively.

CHAPTER VII.

MANSE.

“MANSE appears originally to have signified a portion of ground, from Low Latin *mansa*, a farm, derived from Latin *mansa*, fem. cf. *mansus*, pp. of *manere*, to dwell.”—*Keat*. The manse as a dwelling for parochial clergy appears to have been introduced in Scotland about the thirteenth century.

THE 12th canon of the code of canons enacted by Provincial Councils of the Scottish Church between 1237 and 1286 has a proviso for “a PROPER PARSONAGE-HOUSE to be built near every church within a year’s time”; and the 12th statute of the Provincial Council of 1557, held at Edinburgh, provided that every curate in charge of a parish church should have a MANSE and garden, with a stipend of twenty merks annually in the dioceses of Aberdeen, Moray, Ross, Orkney, and Caithness, and twenty-four merks in the other dioceses.

Under the common law—*i.e.*, for present purposes, the law as it stood down to the passing of the Church of Scotland (Property and Endowments) Act, 1925—the minister of a landward parish was entitled, under the Act of 1663, c. 31 [21], to have a manse provided for him by the heritors. On the other hand, the minister of a burghal parish was not entitled to have a manse provided for him by the heritors, or by the burgh as representing them. The law on both points was settled beyond doubt.

Ministers of a burghal-landward parish claimed right to a manse under the Act (of the Usurpation) 1649, c. 45; and reading this Act as practically incorporated in the later 1663, c. 31, their right was admitted, though only after considerable vacillation of judicial opinion—Lord Mackenzie, in the *Elgin* case (*Magistrates of Elgin v. Gatherer*, 1841, 4 D. 25),

Origin of
right to
manse.

Landward
parish.
Burghal
parish.

Abridge-
ment, p. 271.

Burghal-
landward
parish.

Cases.

saying, "There can be no doubt that in a parish partly burghal and partly landward the heritors are liable to provide a manse. This was settled by the decisions in the cases of *Dunfermline* and *Ayr*, and must therefore be considered a shut point." The cases referred to are *Minister v. Heritors of Dunfermline*, 1805, Mor.; *Manse*, App. i., affd. 1812, 5 Paton, 593; *Auld v. Magistrates of Ayr*, 1825, 4 S. 99; reversed 1827, 2 W. & S. 600. An account of the legislation prior to the Act 1663, c. 31 [21], will be found in the report of the earlier *Elgin* case (*Elgin Heritors v. Troop*, 1769, Mor. 8508; 1 Hailes, 283).

Lord Moncreiff (Lord Justice-Clerk), in the *Annan* case (*Downie v. M'Lean*, 1883, 11 R. 47 at 51), confirmed this—"It is conceded that the minister of a parish partly burghal and partly landward is entitled to be provided with a manse, and, if so, that his right rests on the statute 1663, c. [21]."

Collegiate charges.

Where there were two clergymen in one parish—*i.e.*, where the charge was collegiate—only the first minister, generally, was entitled to a manse. Lord Auchinleck, in 1769, put the matter in a very clear form—"It is a general regulation that ministers are to have manses; but it does not follow, if there are many ministers in a parish, each minister is to have a manse. I consider a second or third minister no more than an assistant, and not entitled to a manse" (*Heritors of Elgin v. Troop* (Elgin), 1769, Mor. 8508; 1 Hailes, 283). And in *Adamson v. Paston* (Cupar, Fife), 14th Feb., 1816, F.C., the claims of a second minister to a manse as of right was expressly rejected. But *Carnegie v. Speid* (Brechtin), 1849, 11 D. 1250, affords an instance in which heritors had been held liable to repair a manse actually occupied by the minister of a second charge; and it was held that this did not affect the liability of the heritors in respect of the legal right of the minister of the first charge to have a manse provided and maintained. And the case of a second minister having a manse, where

the first minister has none, has been referred to within comparatively recent years in *Robbie v. Meiklejohn*, 1868, 7 M. 296, in which, in the Registration Appeal Court, Lord Ardmillan said—“Let me suppose the case of a double charge, where the first minister has £400 and no manse, and the second minister has £200 with a manse, and where, on the death of the first minister, the second minister steps up into the vacant place, and consequently loses his manse. Is he not to be registered because his title to the manse is defeasible at any moment by the occurrence of an event which is entirely beyond his control? I could never so hold.”

There does not seem to be any parish in Scotland where precisely such a state of things exists. There are at present eighteen collegiate parishes; but in all, save two—Elgin, and St. Cuthbert's, Edinburgh—the charges are distinct and separate from each other, so that, on the first becoming vacant, the minister of the second cannot pass to the first without being specially elected and admitted to it. In Elgin and St. Cuthbert's, Edinburgh, where the minister of the second charge steps into the place of the minister of the first charge when it becomes vacant, the second charge has a glebe but no manse attached to its benefice. There is, however, one case, that of Hamilton, where the minister of the second charge has a manse, and the minister of the first charge has not, but there the charges are quite distinct and separate as above mentioned.¹

On the same principle which dictates that the **CHURCH** of a parish should be within the parish, the **MANSE** should be within the parish. The convenience of both minister and parishioners is thus best ensured. It is believed that the occasional modern practice of

Situation of
manse.

¹ See Report to the General Assembly by the Committee on Collegiate Charges, May, 1890, and “Collegiate Charges in the Church of Scotland,” by the Rev. William Simpson, D.D., in Annual Report of the Church Law Society for 1912, pp. 15 *et seq.*

ministers residing beyond the bounds of their parishes is entirely contrary to the theory and practice of parochial ecclesiastical administration, which should not be departed from except for very exceptional causes. It is essential to the preservation of the parochial character of the Scottish Church that ministers (whether of parishes *quoad omnia* or *quoad sacra*) should live among their parishioners. The indefensible practice referred to is most noticeable in large towns where there are no manse. But it may be observed that the clergy of the Roman Catholic Church in Scotland in every case reside within their "missionary districts" or parishes, and there seems no reason why a contrary practice should be sanctioned by the Church of Scotland.

There is a presumption that the MANSE stands on manse ground, and not on GLEBE. Hence in *Rutherglen Heritors*, 1913 S.C. 671, although the manse was said to have occupied the site for many years before the right of a parish minister to half an acre of ground over and above his glebe, as a site for his manse, had been judicially recognised, it was held that, in the absence of any evidence to the contrary, it must be presumed that the ground on which the manse stood was dedicated as manse ground, and as such was something other than glebe. Authority was accordingly granted to the heritors, on transportation of the manse to a new site, to sell the old site.

On whom
obligation to
provide and
maintain
rests.

The obligation to provide and maintain a MANSE was, and to the very limited extent to which it still subsists is, a burden upon the heritors, in the senses in which it has been stated the word is applied in landward and burghal-landward parishes. Persons merely occupying seats in the parish church are not liable (*Farie and Others v. Leitch and Others* (Rutherglen), Feb. 2, 1813, F.C.). The burden is a parochial, not a public one, see *Kinross* case (*Bruce Carstairs v. Greig*, 1773, Mor. 2333, affd. 3 Paton, 675; and *Nicoll v. Hunter* (St. Leonard's), 1829, 7 S. 479).

In a parish partly landward and partly burghal, the magistrates, as representing the community of the burgh, were held to be primarily liable, along with the heritors of the proper landward district, in the expense of maintaining a manse, and the burden was not one which could be laid directly on the individual proprietors within the burgh territory (*Lockhart v. Lockhart* (Lanark), 1832, 10 S. 243; *Magistrates of Elgin v. Gatherer*, 1841, 4 D. 25). It was suggested in the former edition that it might be open to question whether this applied to the case of *building* a manse—see Lord Cowan's observations in *Duddingston* case (*Duke of Abercorn, &c. v. Edinburgh Presbytery*, 1870, 8 M. 733, at p. 740) as to the distinction between "building" and "repairing" a church; although it had to be kept in view that the heritors assessed might be individually benefited by rebuilding a church, and the increased accommodation thereby provided, whereas they could not be beneficially affected by a new manse, the enjoyment of which enured to the minister alone. It may, however, be assumed that the law relative to churches is generally the law also relative to manses. (See *Highland Railway Co. v. Heritors of Kinclaven*, 1870, 8 M. 858, at 861, and *Govan* case, *Glasgow Trades House v. Govan Heritors*, 14 R. 910.) Moreover, it seems to follow from the grounds of judgment in the *Annan* case, *supra*, that where the heritors decide on an assessment according to real rent as necessary to secure an equitable distribution of the burden, the assessment will properly be laid on the proprietors of all lands and houses whether in the burghal or landward part of the parish according to their value as ascertained by the real rent, *i.e.*, by the valuation roll. (See especially Lord Young's judgment, 11 R., at p. 52.) (See also Chap. II., *supra*, pp. 74-79.)

The question of the *cost of the manse* proved at all times a thorny one. The Act 1663, c. 31, on the preamble that "diverse ministers are not sufficiently

In burghal-
landward
parish
individual
proprietors
in burgh
territory not
directly
liable.

Cost of
manse.

provided with manses and glebes," directed that "where *competent* manses are not already built" the heritors of the parish should "build competent manses to their ministers, the expenses thereof not exceeding £1000, and not being beneath 500 merks." This is Scots money. In pounds sterling the sums are £83 6s. 8d. and £27 15s. 6d. Obviously, even the larger of these sums would not in modern times have sufficed to build the humblest of manses.²

In 1760 this difficulty came before the Court in the *Inverury* case (*Minister of Inverury v. Leith*, 1760, not reported), and the Court ordained the heritors to rebuild the manse at a cost of £2000 Scots, the Lord Ordinary (Coalston) having ordained the heritors to build a "competent" manse. (See also *Mercer v. Williamson* (Lethendy), 1786, 3 Paton, 43.) In later cases the view was taken by the House of Lords that the section of the statute of 1663 above quoted which restricted the cost applied only to the case of the erection of new manses where there had been none previously, and that for rebuilding a manse there was no sum fixed (*Dingwall v. Gardiner* (Aberdour), Nov. 27, 1816, F.C., affd. 1821, 3 Bligh, 72 1 Sh.App. 10; cf. *Magistrates of Elgin v. Gatherer* (Elgin), 1841, 4 D. 25).

No record is to be found of any decision regarding the erection of a manse in a parish in which no manse had formerly been, to the effect of imposing a greater cost than the Act of 1663 prescribes.

A FREE MANSE.

Bearing of recent legislation on older law as to "free manse."

The course of legislation, in the Property and Endowments Act, has somewhat detracted from the practical interest, and will in due course largely supersede the importance, which has hitherto attached to

²The "compt of expenses debursit be Mr. David Martin, minister at Auchtertule, in building and repaireing his manse" is engrossed in minute of the Presbytery of Kirkcaldy, 30th August, 1636. (See "Presbyterie Booke," pp. 102-4.)

the conception of "a FREE MANSE," as expressive of the condition into which every minister is entitled to have his manse put on his entry to a parish. But the standards set up as the test of the sufficiency of a manse to be declared "free" are not only interesting and instructive in themselves, but seem, *prima facie*, likely to be resorted to as guides in judging of that "reasonable state of tenantable repair," the absence of which entitles the General Trustees under the Act to apply to the Sheriff for an order directing the heritors to carry out "such repairs, if any, not involving structural alterations as he may consider necessary." And as Sheriffs will probably be guided in making such orders by the indications which the older practice affords, it has seemed desirable to carry forward into the present edition some account of the decisions which went to build up the body of law which defined the qualities characteristic of a "free manse." Inasmuch, however, as it is only in the case of applications which were presented prior to 1st February, 1925 (of which there can be few, if any), that any alteration involving structural alteration can now be ordered, it has not been thought necessary to give the same fully detailed consideration to the cases which are concerned with matters involving that type of alteration which was given in previous editions. A reference to the principal cases is given; and those interested in the details of them will find them in the reports, and to a considerable extent in the last edition of this work.

1925 Act,
sec. 28 (1).

Stuart of Pardovan, writing upon the repair of MANSES, says, p. 174, "As the minister is obliged to leave the manse in as *good condition* as he entered to it, so before he can be made liable so to do, the heritors ought to move the Presbytery to pass an Act in their favours, to declare it a Free Manse; but before they can pass any such Act, a Committee of their number must visit it, after it is built or repaired, and find upon the depositions of four discreet work-

Pardovan's
account.

men who understand that work, but have not been employed therein, two whereof to be chosen by the heritors and other two by the minister, that the building or reparation is *sufficiently finished*." Erskine, Principles, Bk. I. tit. v. sec. 15, observes—"Every incumbent is entitled at his entry to have his manse put into *good condition*; for which purpose the Presbytery may appoint a visitation by tradesmen, and order estimates to be laid before them of the sums necessary for the repairing, which they may proportion among the heritors, according to their valuations. . . . The Presbytery, after the manse is *made sufficient*, ought, upon application of the heritors, to declare it a free manse, which lays the incumbent under an obligation to uphold it in good condition during his incumbency, but they," *i.e.*, presumably, the ministers, "are not bound to make building by the waste of time" (edn. 1911, p. 53).

Act 1663,
c. 31.

Abridge-
ment, p. 271.

The statute on which both expositions are founded is the Act 1663, c. 31 [21], which sets forth, *inter alia*, that "diverse ministers . . . do not get their MANSES *free* at their entry," and that "therefore our Sovereign Lord, with advice foresaid, statutes and ordains that where COMPETENT MANSES are not already built, the heritors of the parish, at the sight of the bishop of the diocese, or such ministers as he shall appoint, with two or three of the most knowing and discreet men of the paroch—[*i.e.*, probably men of skill]—build COMPETENT MANSES to their ministers, the expenses thereof not exceeding £1000, and not being beneath 500 merks; and where *competent manses* are already built, ordains the heritors of the parish to relieve the minister and his executors of all cost, charges, and expenses for repairing of the foresaid manses. Declaring hereby that the manses being *once built and repaired*, and the building or *repairing satisfied* and paid by the heritors in manner fore-said, the said manses shall thereafter be *upholden* by the incumbent ministers during their possession,

Duty on
ministers
to uphold
during
possession.

and by the heritors in time of vacancy, out of the readiest of the vacant stipend."

The Act of 1663 was not the first relating to the REPAIR OF MANSES, but it was the one which introduced the word "free." The observations of Mr. Duncan on the use of the words "free" and "competent" in this Act are of interest. According to him (p. 437), these words had the twofold legal meaning—"1st, that *quoad* its structural condition, the manse is in a complete state of repair; and 2nd, that, *quoad* its size and accommodation, it is 'commodious' or 'sufficient,' or suitable as a place of residence for the incumbent." He goes on to remark that "sufficiency of repair implies not only that the fabric of the building is wind and water-tight, but also that the internal parts and fittings of the house, including windows, shutters, skirting boards, doors, and plaster work, are all complete, and of sound, as opposed to decayed or decaying, material. Elegance of design or finish is not essential; but completeness of finish, together with sound material, seem to be so, inasmuch as it is only through their co-existence that dilapidation, other than that consequent on decay through time, can be prevented. The repair of such dilapidation ought to fall on the heritors, and not on the minister, even in the case of a 'free manse.' But the reverse will, to some extent, almost certainly occur, if an incumbent be compelled to 'uphold' a structure, which is, to any extent, in an unfinished or decaying condition when his occupancy of it commences."

Meaning of terms "free" and "competent" manse.

The minister of Botriphnie was admitted in 1774. The manse was in very bad condition, and he applied to the Presbytery, who gave decree for the necessary repairs. The heritors thought it advisable to build a new manse, which was completed in autumn, 1777. In October, 1778, the Presbytery made a visitation and pronounced the following interlocutor:—"The Presbytery, having considered the accommodations of

Case of Botriphnie.

manse and office-houses erected by the heritors for the minister of Botriphnie, *judged them sufficient* accommodation for Mr. Angus, and his successors in office; and, therefore, they did assoilzie the heritors of the parish of Botriphnie from a decree of repairs of the old manse and office-houses formerly pronounced by them; and appointed that thanks should be returned by the moderator to the heritors, for their having erected such proper accommodation to the minister of Botriphnie." In 1804 the new manse was in disrepair; the minister applied to the Presbytery, and the Presbytery, after appointing an inspection by tradesmen, gave decree for £120. The heritors brought this judgment before the Court of Session and pled that the Presbytery had declared the manse *free* (*Heritors of Botriphnie v. The Minister*, 1805, noticed in report of *Strathaven* case, *infra*, in 1 Dow, at pp. 399-400). The minister successfully answered that the Presbytery's decret was without the usual and essential words of declaring the manse free in terms of law, and that the procedure which had actually taken place left doubts with regard to the Presbytery's intention of declaring the manse to be free; in illustration of this argument the minister, says Connell ("Parishes," 311), founded on the circumstance that the manse was built of home-grown timber, was covered with thatch, and was erected in a damp situation. The Lord Ordinary held that the manse had not been declared free, and the Court on appeal adhered.

Case of
Strathaven.

In the subsequent case of *Strathaven* (*Duke of Hamilton and Others v. Scott*, 1813 H.L. 1 Dow, 393), a manse built in 1761, it was argued by the minister before the Court of Session that "before a manse could be declared free it must be rebuilt from the foundation, or be put into such a state of repair as to afford a rational prospect of affording a comfortable habitation during the minister's incumbency." Lord Eldon, in giving judgment in the House of

Lords, said, "The heritors might relieve themselves. The mode of doing it was by ordering a new manse to be built if necessary, or the existing manse to be repaired in such a manner as entitled them to call for that species of declaration which discharged them; not merely a declaration that the manse was for the time *sufficient*, but a declaration that it was *free* in this sense, that they were liable for no future ordinary repairs during the incumbency" (1 Dow, at p. 402).

When the heritors applied to the Presbytery to declare a manse "FREE," the Presbytery were in use to visit the manse. A deliverance following such visitation declaring the manse to be "free," threw the burden of upholding the manse on the minister. The use of the word "free" and not "competent" or "sufficient" in the deliverance was recommended (*Heritors v. Minister of Bottriphnie and Strathaven* case, *supra*). A manse might become constructively a free manse by long acquiescence or acceptance of the building, *qua* manse, by the minister (*Mackenzie v. Mackenzie* (Lochcarron), 1835, 13 S. 1014; *Elliot v. Hunter* (Kirkton), 1867, 5 M. 1028).

Under the Ecclesiastical Buildings and Glebes ^{31 & 32 Vict.} (Scotland) Act, 1868, sec. 12—the provisions of which ^{c. 96.} are practically superseded by secs. 27 and 28 of the Property and Endowments Act, 1925—after the completion of works ordered in any proceedings under the Act for the building, rebuilding, or repairing of any manse, it was competent for any heritor of the parish to move the Sheriff to declare it a "free manse," notice to the minister of the presentation of the petition being ordered by the Sheriff and opportunity given him to appear for his interest. If he appeared, he usually asked that a remit be made to a man of skill, at the petitioning heritor's expense; and this was not unreasonable. If the Sheriff was satisfied that the manse was "in a state of thorough repair," he found and declared accordingly, and his decree

had the same effect as a decree of Presbytery, but was effective only for fifteen years from its date, or until the appointment of a new minister to the parish, whichever event first happened.

Under the Act the Sheriff might be required to make a personal inspection (sec. 13); and it seems a reasonable implication that he should do so in proceedings before him under sec. 28 of the new Act, where circumstances require this.

Responsi-
bility of
minister for
upkeep of
"free"
manse.

A minister's liability for upholding a free manse was for ordinary tear and wear, not for reconstruction, or such repairs as were due to materials originally defective (*supra*, p. 269); nor for such as would in fact make the building better than it was at the time it was at the time it was declared free. It would seem reasonable that this principle should in the future be observed in practice by agreement between the minister and the General Trustees or the congregation. If the minister neglected the upkeep of a free manse and the building became deteriorated, his representatives might be held responsible. This only applied to free manses, not to manses generally; though there is the doubtful case of *Donaldson v. Brown* (Dolphinton), 1694, Mor. 471, where the Court found they would "not take cognition in what case the manse was at the minister's entry in 1664, so as to burden his executors after twenty-nine years' silence, though the legal prescription in these cases is only forty years." This may or may not have referred only to a manse constructively free, against the state of which the heritors did not complain during the minister's incumbency.

Cases since
the Ecclesias-
tical Building
Act, 1868,
dealt with in
the Sheriff
Courts, and
somewhat
inadequately
reported.

It is unfortunate that, since the passing of the Ecclesiastical Buildings, &c. (Scotland), Act of 1868, which made the Sheriff Court the proper Court for deciding as to repairing or rebuilding churches and manses, with appeal to the Lord Ordinary on Teinds, the cases which have been decided have not always been adequately reported. In the important case of

Biggar (Minister of Biggar v. The Heritors, Biggar case. 1896), decided by Sheriff-Substitute Fyfe in the Sheriff Court of Lanarkshire at Lanark on 2nd April, 1896 (not officially reported), there is to be found in the judgment of the learned Sheriff-Substitute an interesting application to modern conditions of the principles which have been under consideration. In this case the minister of Biggar had asked the Presbytery of Lanark to find that the manse was incapable of being repaired, and that the site was unsuitable, and to order the erection of a new manse on another site. After the Presbytery had obtained the report of a man of skill, the Presbytery, on his recommendation, ordered extensive repairs to be done on the existing manse, to which the heritors ultimately agreed. The minister, however, prosecuted an appeal which had been taken to the Sheriff Court. After a proof, the Sheriff-Substitute found—"That in its present condition the manse of Biggar is not a safe, suitable, and commodious residence for the minister, and that in the circumstances of the case the present dwelling-house ought to be taken down and a new one built: therefore ordains the present dwelling-house to be taken down and a new one to be erected at the site and to the satisfaction of an architect to be afterwards agreed upon, or nominated by the Court." (As the Sheriff did not find the site to be unsuitable, and as there had been negotiations between the parties which rendered it likely that on the liabilities of the heritors being decided the question of site, in view of the necessity for rebuilding, would be arranged between them, the pronouncement as to site was designedly left thus.) In his note the Sheriff observed, *inter alia*—"It was pressed upon me that the minister's petition is for a new manse *and* a new site, and for nothing else, and that the minister in the witness-box stuck to that, and that, unless I am of opinion that the present site should be discarded, I must dis-

miss the appeal. I cannot accept this view. I think the present process is something more than a mere litigation between an individual minister (who might leave the parish to-morrow) and a body of heritors (whose personality is constantly changing). Upon the authorities, as well as upon the express terms of the Act of 1868, I hold that, the case once brought before the Court, the Court not only has the right to consider, but has the duty laid upon it to consider and to decide what in the whole circumstances of the case is best for the interests of the parish and of all concerned, and what is best calculated to avoid in the future a renewal of the conflict between minister and heritors. . . . In my view the house should contain a dining-room, drawing-room, parlour or nursery, and study, and at least five good-sized bedrooms, with proper bathroom, servants' accommodation, stores, and pantries; and the heritors recognise that this extent of accommodation is not an unreasonable demand. The heritors will no doubt see it their interest to avoid future disputes by now taking a liberal view of the accommodation requisite. . . . Upon the whole evidence, I think it is established—(1) That, while repair of any fabric may be tried, in this sense the manse may practically be said to be irreparable; (2) the attempt to bring this building into harmony with present-day ideas of sanitary and residential requirements would be attended with risk, and might prove a failure; and (3) even assuming it could be done, the difference between the cost of such efficient repair and alteration and addition as is necessary and is proposed by the heritors, and the cost of pulling it down and erecting an entirely new fabric, would not be more than about £500 or £600. The heritors could never hope to get the old fabric declared a free manse; and, taking a common-sense and reasonable view of the whole matter, I am satisfied that it is not in the interest of the parish to attempt a reconstruction of the pre-

Measure of appropriate accommodation in a modern (country) manse.

sent manse; that it is not a building on which the reasonable and prudent would spend the large amount of money indicated; and that it is within the ordinary rules of prudence and good management that the heritors should pull down the dwelling-house and build another." The decision, it will be observed, is strictly consistent with the earlier cases decided by the Court of Session, and the observation of Lord Kinloch in the *Insch* case, that "the manse of a minister should be the dwelling-house of a gentleman" (*infra*, p. 291).

Sheriff Fyfe's interesting note will be found printed in full in the Appendix to the last edition at pp. 390-401.

It was recognised as proper that a manse should have a stance of half an acre, and its legitimate ADJUNCTS are a stable, barn, byre, and garden; in modern cases the accommodation as regards outhouses has been increased by washing-house, poultry house, pigstye, and garden wall. A garage would probably now be held to be a reasonable convenience. In the case of a number of the older manses, the offices are of a size and kind which, though well enough suited to the requirements of a minister farming his own glebe, are in excess of what under modern conditions can conveniently be used by the minister. And they have therefore often been allowed to fall into disrepair. In dealing with these under sec. 28 of the Property and Endowments Act, 1925, it has in a number of instances been found expedient to agree on repair of only what are necessary, and to have the remainder removed by the heritors. It also would seem to be reasonable that where gas can be introduced into the manse the minister should have it, he, of course, paying for the gas used by him, just as he pays for the coal used by him for heating purposes. A minister occupying a free manse would not, it is thought, be entitled to put the heritors to expense in procuring a supply of gas. Sheriff-Substitute Scott-Moncrieff held in

Adjuncts of manse, garden, offices, stables, &c.

Offices often unsuited to modern conditions.

Lighting.

Macfarlane v. Watson (Sheriff Court of Stirlingshire, 1890, 7 Sh.Ct.Rep. 19), relative to the manse of Slamannan, that heritors were not bound to supply grates, gasfittings, blinds, and a heating apparatus for a bathroom. As a matter of fact, however, it is quite usual for heritors to supply such fittings as being necessary for the house of a gentleman. The learned Sheriff gave no reasons for his selection of articles which it was *ultra vires* of the heritors to provide. That heritors have a wide discretion as to what is proper to be supplied was recognised in *Malcolm v. Murray*, 1904, 21 Sh.Ct.Rep., at p. 59, by the Sheriff (C. N. Johnston). Within the limits of that very wide discretion the majority of the heritors are understood to bind the minority in the absence of "fraud, or folly so great as to be equivalent to fraud" (*ibid.*, and see *Boswell v. Duke of Portland* (Mauchline), 1834, 13 S. 148).

Grates,
blinds, &c.

Slamannan
case.

Washing-
house.

Domestic hot-
water supply.

A more recent case relating to the same parish of Slamannan (*Minister of Slamannan v. The Heritors*, 1898, not officially reported) is instructive, because this was not a case where straitness of accommodation either in the manse or offices (except as regards the washing-house) was averred. The minister sought repairs and structural rearrangement of accommodation for suitability of habitation. Sheriff-Substitute Russell Bell, of Falkirk, by interlocutor of 31st May, 1898, held that "a washing-house and a scullery—separate and not combined—may be safely said to be parts of the dwelling of a gentleman," but with regard to the bathroom, while he ordered the construction of a new one, he refused to allow the introduction of a hot-water supply. "Granting a sufficient supply of water, it may not unreasonably be maintained that the filling of the boiler is a matter which concerns the occupant of the house, and that, if the objections were merely to his failing to do so, no country house with a private water supply raised by manual labour could have

the benefit of hot water. And it is a hard saying that in days when every flat of houses now erected in towns, occupied by workmen of the better class, is furnished with hot water, such is not a necessary adjunct of the house of a parish minister. But the objection here is one founded on the situation of the manse in a locality not furnished by a general water supply, and is an inconvenience resulting from the situation. No doubt every new manse built in these days would be provided with a hot-water supply, but as yet there is no precedent for its introduction into a manse where it did not formerly exist, so, with reluctance, I find myself compelled to conclude that the heritors cannot be required to furnish it." Sheriff Russell Bell's judgment is printed in full in the Appendix to the last edition (pp. 407-410), and may usefully be referred to in regard to some of the minor conveniences respecting which questions arose.

It does not seem that the view taken by the learned Sheriff-Substitute in this case as to the introduction of a hot-water supply would necessarily have commended itself to other judges. As a rule, a hot-water supply was in recent times usually provided without demur. And in *Church of Scotland General Trustees v. Ardnamurchan Heritors*, 1927, 44 Sh.Ct.Rep. 83; 1928 S.L.T. (Sh.Ct.) 3, Sheriff Wark (Argyllshire) decerned for such a supply as permissible and proper under sec. 28 (1) of the Act of 1925.

In the case of *Moonzie (Earl of Glasgow, &c. v. Murray*, 1868, 7 M. 6) the Court held that a force-pump for a water-closet was a mere accessory to the water-closet which the heritors were bound to provide: it was not of the nature of an addition to the manse; opinion was reserved as to a case where water for the water-closet could not be obtained except at great cost. In the case of the *Earl of Cawdor v. Ross* (Ardersier), 1868, 39 Jur. 553 (in the report of which a number of earlier authorities are noted), Lord

Sufficient
domestic
water supply
an essential
requisite.

Kinloch laid it down that "a sufficient supply of wholesome water is a necessity of life in any reasonable sense of the term," and expressed the view that a manse was entitled to have such a supply. He also suggested that if an existing supply of such water should wholly fail, the heritors might be required, if practicable, to provide a substituted supply, and that the mere fact that the manse was not otherwise in disrepair would not preclude the minister from requiring this. But in the particular case—one of an old manse where there was a sufficient supply of good water from wells in the manse ground or adjoining glebe—he held that the minister was not entitled (the manse otherwise not being materially in disrepair) to put the heritors to the cost of "introducing" the water supply into the house by the erection of a somewhat expensive pumping plant. He indicated, however, that if the question had arisen in connection with the erection of a new manse, he would have reached a different conclusion, and it seems probable that this would have been the result also had the question arisen in connection with extensive repairs at the commencement of an incumbency, incidental to proceedings for having the manse declared free.

Liability for a water rate is a question of circumstances.

In *Smith v. Heritors of Prestonpans*, 1903, 5 F. 333, it was held that heritors were entitled to discharge their obligation to provide a manse with water by connecting it with a public water supply, and that they were not thereafter bound to relieve the minister of the water rates imposed on him as owner and occupier of the manse and glebe. It would, however, be a misreading of this decision to regard it as an authority for the proposition that, where heritors have arranged for the supply of water to a manse *de facto* sufficient but drawn from a source in respect of which an annual payment is exigible, they have fulfilled their duty, and are not responsible for whatever payment may be necessary to ensure the

continuance of the supply, but may leave this to be borne by the minister. Neither the facts nor the opinions of the judges in the *Prestonpans* case lend any countenance to this view. The only question there raised was as to the minister's right to relief from the heritors for a statutory water rate for which he was liable as owner and occupier of the manse quite irrespectively of whether he used the water supply or not. His liability to pay this was altogether independent of any right which he had against the heritors; and, as Lord Kinnear pointed out, had nothing whatever to do with any legal relation between him and the heritors. There was therefore no reason why the heritors should have been held liable to relieve him of a rate for which he would have been liable even had they furnished him with a satisfactory supply from another source. The common law position seems to have been that, as part of the obligation to provide a "competent manse," heritors were under obligation to see that the minister had a reasonable supply of water for the manse (see *Earl of Cawdor v. Ross*, *supra*; and *Prestonpans*, per Lord Low, Ordinary, 5 F., at p. 334); and they must meet the expense of this. Subject to their fulfilling this obligation, they were entitled to do so in the way most convenient and least expensive for themselves. And if they could do so by linking up the manse with a water district supply which the minister was entitled to use without other cost than payment of a rate for which he was in any case liable, they were imposing no liability on him in respect of the supply, although they were enabled to implement their obligation very cheaply for themselves.

But it is thought that the case would be entirely different where, in order to obtain the supply which the heritors were liable to furnish, a payment for the water (whether in a slump sum or by an annual payment) had to be made for the water, being a payment for which the minister would not be liable merely by

reason of his ownership or occupancy. In this case the capital sum or annual payment was merely the cost to the heritors of fulfilling their obligation in a particular way. If it was excessive, they might offer a supply otherwise; and if this could only be done at prohibitory cost, it might be a reason for regarding the site of the manse as unsuitable, and for removal to another on an appropriate occasion. But the water must be supplied by the heritors. This, indeed, seems to have been recognised in the *Prestonpans* case by the heritors; because it appears that, prior to the creation of the county water district which involved the minister in liability for rating, the heritors had supplied the manse from an adjoining burgh supply pipe, and apparently had paid the charge for this without demur. Of course the provisions of sec. 27 of the Property and Endowments Act, 1925, preclude a demand being now made for any new source of supply involving structural alteration. But it is thought that the General Trustees as now representing the rights of the minister are entitled to continuance of the existing supply, in the condition in which it stands, at the cost of the heritors, who have chosen the particular method of implementing the obligation which has hitherto rested on them.

Right to have existing water supply continued on transfer under 1925 Act.

Garden wall.

A minister has been frequently found entitled to a GARDEN WALL (*Maxwell v. Presbytery of Langholm* (Half Morton), 1867, 40 Jur. 13, 5 S.L.R. 16; see also *Elliott v. Hunter* (Kirkton), 1867, 5 M. 1028). In the second *Slamannan* case, *supra*, Sheriff Russell Bell held that the heritors could not be called on to increase the height of a wall which already existed. *Sed quære*, if conditions had materially changed since erection? "The manse garden, in so far as regards vegetables and fruit, does not require to be immediately adjacent to the manse; and as to a flower garden, or plots for flowers, a wall is not required or desirable" (per Lord Justice-Clerk (Patton) in *Elliot v. Hunter*, *supra*, at p. 1032). In the *Half Morton* case it was averred there

was a good hedge; the Presbytery admitted there was a partial enclosure hedge, but explained that a wall was required for protection from hares and rabbits. A wall was ordered.

In the case of *Kilbrandon* (*MacPhail v. Heritors of Kilbrandon*, 1914 S.C. 1015), Lord Ormidale (as Lord Ordinary on Teinds) expressed the opinion that "if a wall becomes ruinous through no fault of the minister, the heritors are bound to rebuild it" (*loc. cit.*, p. 1019).

Obligation to rebuild wall.

Kilbrandon case.

In the same case the question arose—apparently as a novel one—whether the heritors were bound to put in order and maintain a private road running through the glebe, and forming the only access to the manse. Lord Ormidale held that they were, observing that "the manse ceases to be a sufficient manse if it ceases to be accessible" (*ibid.*, p. 1019).

Obligation to maintain access to manse.

That a minister may LET his manse for a short period has been decided in the case of *Aberdour* (*Aberdour Heritors v. Roddick*, 1871, 10 M. 221), where the minister for several years had let his manse furnished for two months in summer while he took his family to another part of the country for change of air. The duties of the parish were discharged by a substitute who did not reside in the manse, and the minister came occasionally to preach on Sundays. The heritors having raised an action against the minister, concluding for declarator that he had no right to let the manse, and for interdict against his doing so, held that, as the letting of the manse did not injure it, the heritors had no interest or title to interfere.

To what extent may minister let his manse?

Aberdour case.

The Lord Justice-Clerk (Moncreiff) observed (p. 224)—"I do not think the heritors have any title to insist in this declarator, apart from their interest as liable to maintain the building. They are not proprietors of the manse. Neither are they, in any sense, the trustees of the property. In virtue of their resulting obligation they have a title to see that the property is duly administered with a view to its being kept in

repair. But they have nothing more; they have no right beyond this to interfere in any way with the minister's possession or administration. Their right in the church and churchyard stands on an entirely different footing, for as regards them the minister has no patrimonial interest in either, and the heritors have the property as administrators-in-trust. But a minister's right to his manse and glebe is entirely otherwise. He is more than occupant. He represents and administers for the series of incumbents who are collectively the proprietors. He cannot affect the interest of his successors; but subject to this condition he has all the rights of a proprietor, at least so far as necessary for the complete enjoyment of the subject for the period of his incumbency. . . . His right is precisely of the same kind as his right to the glebe. I give no opinion as to how far the minister can virtually alienate the manse during his incumbency, or let it for a prolonged term to his own exclusion. I can conceive cases in which this might not be an unreasonable exercise of his power. I can also conceive cases in which it would be entirely inadmissible." Illustrating his argument as to the right of a schoolmaster to let his house, Lord Young observed in the case of *Eckford School Board v. Rutherford*, 1889, 16 R. 377, at p. 382, that "The manses of parish clergymen are often let in summer. That is quite lawful, though no doubt the Presbytery would interfere if the thing were done to the prejudice of the parish." Within this limit, the minister's right "is not merely a right of personal residence," but one which can "be turned into money" (per Lord President Robertson, *Inland Revenue v. Fry* (Girvan), 1895, 22 R. 422, at p. 425).

Procedure
where refusal
or delay on
part of
heritors.

If the heritors refused or delayed to deal with a question connected with the sufficiency of manse accommodation, the matter might be brought before the Presbytery. The Presbytery inspected the build-

ing, and after a report by a man of skill could ordain the heritors to repair, repair and enlarge, or rebuild the manse, as the case might require. (See Procedure under the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868, *infra*, Chap. IX.) If the heritors disregarded the Presbytery's deliverance, that body themselves proceeded to carry it into force, making contracts and seeing them executed. The Court of Session would grant warrant to enforce payment by the heritors of the cost of the repairs decerned for by the Presbytery. But a deliverance by a Presbytery in regard to the repairs of a manse might be removed to the Sheriff Court under sec. 3 of the Ecclesiastical Buildings Act; and the Sheriff's judgment thereon could not be appealed to the Inner House, but only to the Lord Ordinary on Teinds.

While the manse was being rebuilt the minister was entitled either to another suitable residence, or to a payment to enable him to provide for himself. If there were no manse in the parish when the minister entered upon the charge he was entitled to "MAILL" till it was provided. The Presbytery had no power in this matter; the minister must make his claim good in the ordinary civil Courts (*Potter v. Heritors of Kippen* (Kippen), 1708, 4 Br. Supp. 691; *Steel v. His Parishioners* (Lochmaben), 1712, Mor. 8502). MANSE MAILL in a burghal parish may be a set sum, part of the benefice which is paid to the minister in lieu of providing a residence. In some instances, heritors by agreement with a minister on his entry to his charge have agreed to pay him an annual sum during his incumbency which he has accepted in lieu of requiring the manse to be put into thorough repair. In such cases the minister probably has generally let the manse, and, with the rent and the payment from the heritors, has rented a suitable house for himself. Such a payment being made in lieu of implement of the obligation to provide a "competent manse" would appear to be essentially of the nature of manse

Manse mail.

Manse mail in a burgh may be a part of the benefice.

maill, notwithstanding the fact that the minister enjoys the manse in its unrepaired or insufficient condition. And it is thought that the provisions of sec. 40 of the Property and Endowments Act, 1925, for redemption of manse maill may extend to such payments. Of course, prior to this Act any such arrangement as to manse maill was personal to the minister, and would not (at least in the case of a non-burghal parish) preclude his successors from requiring a competent manse. But under sec. 40 of the Act the test is that manse maill is "at the passing of the Act payable in lieu of a manse." Obviously both redemption of the payment and the putting of the manse into tenantable repair could not be claimed.

Manse maill
during
repairs.

Whether a minister is entitled to manse maill when—being once in occupancy—he is required to remove from the manse to allow of extensive repairs—or even when papering and painting have to be done—would seem to be a question of circumstances. Such claims were probably rare, and would be justified only if the repairs in progress were of such a kind as to render continued occupancy of the manse so uncomfortable as to be practically incompatible with the proper discharge of the minister's duties. As such things as papering and painting, in particular, are done for the minister's own comfort, and probably at his request, he should show himself as little disposed to be querulous as possible. In early times manses were neither painted nor papered.

Selection of
site for new
manse.

When a new manse had to be built, its SITUATION should be as near to the church as circumstances of healthy situation, convenience, &c., permitted. The parties mainly interested were the minister, who desired a comfortable and healthy abode for himself and his family, and the heritors, who wished to be assured that its situation would not cause unnecessary expense, and that its maintenance would be, from circumstances of soil or position, as little burdensome to them in future as possible. Yet it appears that the right of selecting a site might be

in the Presbytery, its decision being subject to review by the Court of Session. (See *Steel v. His Parishioners* (Lochmaben), 1712, Mor. 5131; a case of glebe.)

In the case of *Gordon and Others v. Claxton* (Cathcart), 1902, 18 Sh.Ct.Rep. 299, decided in the Sheriff Court of Renfrew and Bute by Sheriff-Substitute Lyell, an interesting question was considered as to the position arising where a part of the manse ground was requisitioned under the Lands Clauses Acts. A railway company having served a notice to treat for a small portion of the lawn of a manse, and having agreed with the minister to take the whole subjects, under sec. 90 of the Lands Clauses Act, 1845, the heritors agreed to sell to the company the manse subjects at a certain price. The minister also agreed to accept a certain sum as compensation for personal inconvenience in addition to the amount to be paid to the heritors as the value of the manse subjects. The minister then brought a petition before the Presbytery of the bounds seeking to have the heritors ordained to provide him with a manse, the first deliverance in which was appealed to the Sheriff. It was held that the petition fell to be dismissed as premature, in respect that there was already at the time of its presentation an existing manse in the parish which was not alleged to be ruinous or dangerous. It was observed that the heritors, being in no sense the proprietors of the manse, were not entitled to treat with a railway company for the sale thereof; and, further, that the minister, as an owner under disability, had no right to bargain with the railway company either for the price of the manse or for compensation for disturbance, except in terms of the Lands Clauses Act, 1845, secs. 9, 67, and 71.

In *St. Andrews University Court v. St. Andrews Presbytery* (St. Leonard's), 1905, 22 Sh.Ct.Rep. 209, decided in the Sheriff Court of Fifeshire at Cupar, Sheriff-Substitute Armour decided that Church lands mortified to a University are liable to be designated for a manse and glebe *primo loco*. The meaning of

Position where manse land requisitioned under Lands Clauses Acts.

8 Vict. c. 19.

Designation of land for manse :
Church lands mortified to University liable *primo loco*.

“Incorporate acres.” the term “incorporate acres” was there also considered, and it was held that, to get the benefit of the exception in the Act 1663, c. 31 [21], under this head, lands in a town must be shown to be actually built upon or laid out in gardens, and other lands near the church must have been offered in their stead.

Position of assistant and successor as regards manse.

AN ASSISTANT AND SUCCESSOR is not entitled to have a residence provided for him by the heritors. If, however, the senior minister continues to reside in the manse, and the assistant and successor is unable to find a suitable residence within the parish, the latter is entitled to bring the state of matters before the Presbytery by petition, so that as curators of the benefice they may advise with him, with the parishioners, and if need be with the elder minister as to the best course to be taken in the circumstances. A manse is provided to be the official residence of the parish clergyman, and it should be occupied by the person who discharges the everyday duties of parish clergyman.

MANSE REPAIRS.

(1) *Additions.*

When might ADDITIONS be ordered?

The question of the circumstances under which the heritors were liable to make, or the Presbytery or other Court was entitled to order, ADDITIONS TO A MANSE is now one mainly of historical interest, by reason of the provision of secs. 27 and 28 of the Property and Endowments Act (*infra*, pp. 300, &c.). It will, therefore, be sufficient to indicate broadly the principles deducible from the decisions, without entering into such details of them as were relevant formerly. A fuller account of some of the older cases will be found in the last edition.

Principles deducible from decisions.

Existence of material disrepair a condition precedent to order for additions. *Kirkton* case.

We seem to find a general answer to the question in the case of *Kirkton* (*Elliot v. Hunter*, 1867, 5 M. 1028), in which it was laid down that unless there was “a condition of disrepair involving structural renovation,” or the repairs involved were at least

“considerable,” a Presbytery was not entitled to order additions.

In the old case of *Dalmeny* (*Robertson v. Lord Dalmeny*, *Rosebery*, 1788, Mor. 8515), the manse had been built for the parish minister from the foundation; but after a few years he found that “from the increase of his family” the manse was not sufficiently large. He made application to the Presbytery, which, besides ordering some trifling alterations, required a new kitchen to be built. In an action raised by Lord Rosebery, the Court of Session gave effect to his contention that, while the law authorised Presbyteries “in case of any negligence or unwillingness on the part of the heritors to direct the rebuilding or reparation of manses,” it was never intended that ministers “should be entitled to require from time to time such alterations as might be thought necessary for their peculiar exigencies. . . . Besides rendering the burden on the landholders infinitely more heavy than is at all requisite, this would open a door for continual disputes between ministers and their parishioners, to the diminution of the respect due to that class of men, and consequently extremely hurtful to their general usefulness.” In the later case of *Channelkirk* (*Shiells v. The Channelkirk Heritors*, decided in 1818, but only reported in 1835, 13 S. 1018) there seems to have been some difference of opinion among the judges as to whether the case of *Dalmeny* did not fall to be regarded as a special one, as the manse had been built in the incumbent’s lifetime. But in the case of *Strathblane* (*Strathblane Heritors v. Duke of Hamilton*, 1827, 5 S. 847) Lord Craigie said that he had reported the *Dalmeny* case, and he thought that the rule there laid down was a general one. Be this as it may, the rule enunciated in the *Dalmeny* case was based on considerations which may very well be kept in view as a wholesome rule of conduct by all concerned in dealing with such questions—pointing to the expediency of dealing with them

Insufficiency of accommodation for family requirements of particular minister not relevant.

in a spirit of reasonableness and mutual accommodation.

Channelkirk.

In the *Channelkirk* case, *supra*, the minister who had been admitted in 1809 applied in 1814 to the Presbytery, which, in addition to various repairs offered by the heritors, ordered certain additional rooms to be made. The Court of Session held that in so doing the Presbytery had exceeded its powers, as the manse was said to have been built only about thirty years before, and to be a substantial building although in need of some repairs.

Strathblane.

With this may be contrasted the case of *Strathblane*, *supra*, in which the manse, built in 1732, was said to be incurably damp, in a state of great disrepair, and most incommodious, there being only two public apartments on the lower floor and four bedrooms on the upper, besides kitchen and offices. The Presbytery found that the manse, even if repaired, "will not afford suitable accommodation to the minister. . . . There is required the additional accommodation of two public rooms of moderate dimensions." They therefore ordained such an addition to be made, and the First Division found that they were acting within their powers. Lord Balgray observed that the manse was "quite insufficient for the accommodation of a clergyman and his family, and for those who must necessarily reside in the house on the occasion of dispensing the sacrament." With this the later case of *Lochcarron* (*Mackenzie v. MacKenzie*, 1835, 13 S. 1014), in which the Presbytery in 1832 ordered additions which the Court declined to enforce, is not inconsistent. For there the minister and Presbytery had in 1821 expressed themselves as satisfied with the manse, and it was in view of this that the Court held that there was no sufficient ground in 1832 to support an application for any addition.

Symington.

Two years afterwards came the case of *Symington* (*Carmichael v. MacLean*, 1837, 15 S. 1020). There the manse had been rebuilt in 1790; in 1824 a washing-

house was added and some repairs executed, the work costing in all some £50. The whole valued teind was £75, and the minister's stipend was made up to £150 by a supplement under the Small Livings Act. A minister having been admitted in 1834, long and tedious negotiations followed as to the manse, the heritors having consulted a man of skill and then declined to carry out his recommendations. The matter having been brought before the Presbytery, the heritors "restricted themselves" to an offer "to put the manse and offices in a complete state of repair according to law." On the case going to the Court of Session, the Lord Ordinary (Moncreiff) reported it to the Second Division, which in turn remitted to a man of skill to report, and afterwards sent the case back to the Lord Ordinary, who approved of the repairs, alterations, *and additions* recommended in that report. The Lord Ordinary observed that, although a minister is not entitled to have a manse added to simply to conform to the fashions of the time, or because some repairs may be necessary, yet he held it to "be equally settled that, where a manse has, either from original insufficiency or by the lapse of time, come to be in such a state that it requires extensive repairs to render it even habitable, it is then competent for the Presbytery, and for the Court in reviewing their sentence, to consider not merely what is absolutely essential to render the old building habitable, but what ought reasonably to be done, by alterations and additions, to render the manse a suitable residence for the minister in the circumstances of the parish." Both parties reclaimed, but the Court adhered.

Where from original insufficiency or lapse of time extensive repairs are necessary, reasonable additions might also be ordered.

In the case of *Kingoldrum (Heritors of Kingoldrum v. Haldane*, decided in 1863, 1 M. 325), in which the Court held that the Presbytery was justified in ordering additions but to a less extent than they had done, Lord Jerviswoode, in an elaborate and careful judgment, reviewed the earlier cases as to manse additions.

The following passage from his judgment fairly summarises the law as it had been developed down to that date:—"In the opinion of the Lord Ordinary such operations as are designated as repairs ought truly to consist merely in replacing in good condition that which had previously existed, and which by wear and tear, and by lapse of time, had fallen into bad condition, that is, into disrepair. . . . At this moment the manse in question is not fit for the minister as a residence, not merely through disrepair, but through original misconstruction in various important respects; and, if so, the alterations, and what are called repairs, are truly of a class which, as the Lord Ordinary thinks, would have warranted the Presbytery to have ordained a new manse to be built had such a case been brought before them; unless the heritors could have satisfied the Presbytery that by alterations and repairs their obligation might be satisfied, and the manse rendered in all respects truly sufficient. But if this be the sound view of the abstract law of the case, then the question comes truly to this—whether, seeing this is not a case, in any view which can be justly taken of it, of mere repair, but of substantial alteration and change in the character of the building, there does not arise that right in the Presbytery, which has been recognised in such cases as those of *Strathblane* and of *Carmichael v. M'Lean* (*supra*), to ordain additions which will truly render the manse a suitable and fit residence for the minister of the parish. On the whole, the Lord Ordinary thinks that there is here ground to warrant an approval of the repairs and additions recommended by the man of skill."

There is no inconsistency between that decision and the decision in *Elliott v. Hunter* (Kirkton), 1867, 5 M. 1028, in which the Second Division held that a Presbytery has no power to order heritors to build an addition to a manse which is insufficient in point of accommodation if it be in a good state of repair.

Finally, the important case of *Insch (Heritors of Insch. Insch v. Storie*, 1869, 8 M. 363), may be referred to and certain passages from the judgments cited as concluding consideration of this matter. The manse was built in 1769, and a wing was added in 1822. In 1860 it was repaired, and some trifling additions made, such as coal-cellar, washing-house, &c. In all £270 was spent. The Presbytery of Garioch, about 1868 or 1869, found that the manse consisted of dining-room, sitting-room, study, three bedrooms, one dressing-room, three attics, kitchen, servant's bed-closet, pantries, closets, &c. On the report of a man of skill the Presbytery ordered certain additions, which were estimated to cost £702 3s. The heritors offered repairs to cost £216 19s., but refused additions. The First Division held that the condition of the manse was such that the Presbytery were entitled to order not only repairs but additions. The Lord President (Inglis) said, "It appears to me that the cases in which a Presbytery may order additions to a manse which is clearly unsuitable in capacity and accommodation for the minister are those in which it has either become impossible to keep it up at all without structural alteration, or in which the extent and expense of the repairs, even assuming that they do not involve structural alterations, are very large, and approach to the cost of what is necessary to convert it, by additions and alterations, into a suitable residence."

Lord Kinloch said, "I think it clear—(1) That the Court has not, in the case of the manse, applied the rigorous rule on which they have largely acted in the case of the church, viz., that they cannot order an enlargement unless repairs are necessary to such an extent as would cost nearly as much as the construction of a new church; (2) that they have considered the fact of extensive repairs, though not rising to this magnitude, being necessary to make the manse habitable, as sufficient to let in consideration of the

Lord Kinloch's summary of principles applicable.

question whether additions, greater or smaller, should not at the same time be ordered. The necessity of structural renovation in one or other parts of the building is naturally an important element; but I do not consider this indispensable to admit the interposition of the Court, provided the repairs necessary are of a substantial and extensive description. The jurisdiction thus originated is necessarily of a discretionary character; but this element imbues to a large extent our whole jurisdiction in this matter. . . . I am satisfied that, applying soundly the principle applicable to the case, the Court is entitled, in ordering repairs, to order additions also. In this way the main reason of suspension of the Presbytery's decree entirely falls to the ground. It would have been with much regret had I found myself compelled to come to any other conclusion. It is of great importance that the residence of the minister of the parish should be suitable to his position and comfortable for his family, not merely as a tribute due to a most valuable and useful class of men, but with reference also to those moral influences which are very closely connected with suitable and comfortable dwellings. The manse of a minister should be the dwelling-house of a gentleman. This is very properly attended to in construction of new manses. But there survive too many old fabrics like that in the present case, which, utterly unfit as they are for comfortable or even decent residence, have strongly built walls, and obstinately refuse to go into decay. These often resist, and resist successfully, the judicial hand which would amend them. It is fortunate if, when unable to order a new manse, we can at least authorise those additions and alterations which will to some lesser extent enable the old building to discharge its proper function, and exhibit the true character of a clerical residence."

It is thought that these observations, so far as they relate to the general nature of a manse and its suitability as the residence of the parish minister, remain

relevant in considering what is a "reasonable state of tenantable repair" in applying sec. 28 of the Property and Endowments Act, 1925—subject always, of course, to the exclusion under that section of any repairs which would involve "structural alterations"—(as distinguished from the "structural renovations" mentioned by Lord Kinloch)—however desirable these might otherwise be.

(2) *Repairs or Rebuilding.*

A minister, when in doubt, always wished a new manse to be built: heritors always wished to repair. The question to be decided was which resolution would, in the long run, be best for the heritors, *i.e.*, for those parishioners who would be assessed for either repairs or rebuilding. The condition of many old manses, however, was such that it was often difficult to decide the question.

Criterion as between repairing or rebuilding.

In the case of *Kirkliston*, the Lord Ordinary, Lord Meadowbank, remitted (11th July, 1805) to an architect to report—"1st, how far the manse is defective in safety, comfort, and accommodation for the use of a minister of that parish; 2nd, whether by any, and if by any by what, reparations, alterations, and additions it may be rendered a sufficient manse, and at what expense; 3rd, at what expense a sufficient new manse, affording proper accommodation to the minister, could be furnished" (Connell on "Parishes," p. 296). His lordship gave the following instructions:—"In making this inspection and report, the architect will have in view that no minister is entitled to have a new manse or his present one altered merely from the size, form, or arrangements of the apartments being ill-suited to the improved fashion of the times, but that he has a right to have a substantial dwelling, not unsuitable to the revenue of the benefice, and decently and comfortably finished without and within; and that if an old manse has become ruinous in whole

Principles deducible from decisions.

Kirkliston.

or in part, so that renovation rather than reparation has become necessary, such renovation may, with propriety, be adapted to the taste of the times—moderation in dimension and simplicity in ornament being always rigidly observed.”

Dalyell.

In the case of *Dalyell* (*Hamilton v. Clason*, 1825, 4 S. 543), the Presbytery, having appointed a manse to be erected on another part of the glebe pointed out by them, the case came before the Lord Ordinary on the contention of the principal heritor that part of the old manse was capable of repair, and that the erection of a new manse on a new site was therefore unnecessary. After sundry procedure, the case came on a reclaiming note before the Second Division, which remitted for a report specially on the points—1st, how far the manse was defective in safety, comfort, and accommodation for the use of the minister of the parish; 2nd, whether, if by any, by what repairs, alterations, and additions it might be rendered a sufficient manse, and at what expense; 3rd, at what expense a sufficient new manse, affording proper accommodation to the minister, could be furnished; 4th, to report on the plans and estimates of additions and repairs given in by the objecting heritor, and that of the Presbytery for a new manse. The Court ultimately adhered to the Lord Ordinary’s interlocutor appointing a new manse to be built, but restricted the expense to £678. In the *Odrig* case (*Heritors v. Minister of Odrig*, 1851, 13 D. 1332) Lord Fullerton observed—“Where, in a case involving the obligation of heritors to rebuild, a comparison is instituted between the expense of rebuilding and that of repair, the latter must be understood to be a total and efficient repair, which will place the building nearly in the same situation as to comfort and stability as if it were rebuilt. It must be a repair such as will leave the manse what is called ‘free,’ and impose on the incumbent the obligation of keeping it up.”

Odrig.

Reference may also be made to the cases of *Anwoth*,

March 5, 1812, Connell, p. 306; *Dunnichen (Dempster v. Headrick)*, Dec. 3, 1813, Connell, pp. 301 and 302; and *Heritors of Inch v. Storie*, 1869, 8 M. 363.

As regards the comparative cost of rebuilding and repairing a manse, reference may be made to the case of *Carnwath (Bertram, &c. v. Presbytery of Lanark)*, 1864, 2 M. 1406, which referred to the repair of a church; the Court ordered it to be rebuilt. Lord Neaves, who gave the leading opinion, said (p. 1413), "Before speaking to the particular circumstances of this case, it may be desirable to consider what the law on the subject is. It is clear, in the first place, that the reparation of a church (the fact that repair is possible) will not entitle a minority of the heritors to say that the church must be repaired. There is scarcely anything that may not be repaired; a building which is in ruins may be restored altogether by a process of repairing. It may not be possible to lay down any exact rule on the subject, but the questions seem always to be as to the *reasonableness of repairing*, in reference to the considerations by which reasonable men would be guided." Lord Neaves further *inter alia*, referred to the case of *Rosskeen (MacLeod, &c. v. Carment)*, 1830, 8 Shaw, 475) as a positive authority for rebuilding if repairs would cost three-fourths of the cost of a new church. Finally, at p. 479, Lord Pitmilley observed—"The general question always is whether it is more prudent or expedient to repair or to rebuild; for there is no building utterly incapable of being repaired. That is the only question; and when that is attended to, there cannot be any embarrassment at all.

Comparative
cost as factor.

Carnwath
case.

There seems reason, on authority as well as on principle, for holding that the financial considerations applicable to the rebuilding of a church also applied, *mutatis mutandis*, to the case of rebuilding a manse. In *Dundas v. Nicolson*, 1778, Hailes' Decisions, 802, Lord Braxfield said—"The case of repairing the manse is the same with the case of building a church."

Summary.

To sum up, the question which presented itself was, is a manse practically unrepairable *in law*? It was so regarded (1) “not only when the building was in such a state of ruin or dilapidation or structural unsoundness as to render practically impossible or unsafe the operation of introducing into or engrafting upon the existing fabric the new materials required in its reparation, but also when the outlay on repairs required to put the building [church] in a sufficient and serviceable condition would, in the circumstances, and having regard to the probable endurance of the building in a state of sufficiency after it is repaired, be an injudicious expenditure” (Duncan, pp. 181, 182); or (2) “when it ought not to be repaired consistently with motives of prudence” (Duncan, p. 635). One item to be taken into account is “the estimated cost of upholding the old building after being repaired, and the probable period of its maintenance in a sufficient state.”

OTHER POINTS RELATING TO MANSES.

A parish minister was not until recently liable to be assessed for poor rates in respect of his manse and glebe (*Forbes v. Gibson* (Symington), Dec. 18, 1850, 13 D. 341), but he was always liable for school rates under the Education Acts (*Hogg v. Parochial Board of Auchtermuchty*, 1880, 7 R. 986).

In giving judgment on the merits of the latter claim, Lord Young (at 7 R., p. 995) referred to the exemption from poor's assessment thus—“It is, I think, undoubtedly a class privilege, which the pursuer enjoys only as an individual member of the class, and does not attach to the parish manse and glebe in whose hands soever they may be, but only to his own ownership and occupation of them as parish minister. If he let the manse to a householder or the glebe to a neighbouring farmer, it is not, I suppose, doubtful that his tenants would be

Privilege of exemption personal to minister.

liable to poor's assessment as occupiers of these lands and heritages. The ownership of manses is probably inalienable, though the right of occupation is not; but glebes may be feued or long leased to the effect of subjecting the feuars or leaseholders to assessments as owners. It is unnecessary, however, to press or to dwell on this topic, the conclusion that the privilege of exemption is personal to the minister being otherwise clear. Now, this personal, or rather class, privilege stands on ancient usage, *i.e.*, on customary or common law, according to a well-known principle of which the usage is the measure of its extent. But according to this measure, *the extent is clearly limited to poor's assessment.*" Lord Young (p. 996) went on to point out that this exemption of parish ministers from payment of poor rates was a solitary survival, so far as known to him, of a class privilege of exemption from taxation, and that it was due probably to a blunder in the Poor Law Act of 1845, and was not a privilege to be extended by implication in the construction of a modern statute provided its language fairly admitted of another construction.

And limited to poor rates.

The point of its extension to cover exemption from education rates was again raised in the case of *Locks (Gillanders v. Campbell)*, 1884, 12 R. 309, when the decision in the *Auchtermuchty* case, *supra*, was approved and followed, the Lord President (Inglis) observing that "The poor law and the Education Act appear to me to present a most complete contrast to one another" (p. 313). As to the extension of the exemption from poor rates to the minister of a second charge, see *Heritors and Kirk-Session of Cargill v. Tasker*, Feb. 26, 1816, F.C.; *Forbes v. Gibson* (Symington), 1850, 13 D. 341.

Does not extend to education rates.

Is minister of second charge exempt?

The exemption, regarded by Lord Young as so anomalous, has now been abolished by sec. 2 (4) of the Rating (Scotland) Act, 1926, which provides that "The exemption from payment of the rate for the relief of the poor and of any other rate leviable by

16 & 17 Geo. V. c. 47.

reference to the persons liable for that rate possessed and enjoyed by ministers in respect of their manse and glebes shall cease."

Liability for
paving and
road assess-
ments.

A minister is liable for road assessments *qua* proprietor and occupier of his manse and glebe (*Cowan v. Gordon*, 1868, 6 M. 1018).'

It was held in a case in the Sheriff Court of Stirlingshire (*Brown v. Lang* (Stirling), 1888, 4 Sh.Ct.Rep. 273) that a parish minister is "owner" of his manse in the sense of sec. 212 of the Police Act, 1850, and as such is liable for the expense of laying down a footway opposite to the manse.

So, too, where burgh police commissioners issued an order on a parish minister as owner of the manse and glebe (subjects which fronted on a street) to pave a footpath on the street, and, on his failure to pave, executed the work and charged the minister with the expense, they recovered it from him. He afterwards suing the heritors for relief in the Sheriff Court of Ayrshire at Kilmarnock, it was held (1) that he was owner and the heritors were not "owners"; (2) that the feuing of the glebe by him with the heritors' consent did not make them liable; and (3) that there was no right of relief. In giving judgment the Sheriff-Substitute (D. J. Mackenzie) made some interesting observations on the position of heritors with respect to manses and glebes (*Dunnett v. Heritors of Kilmarnock*, 1905, 21 Sh.Ct.Rep. 260). (As to the position under the Act of 1925, see *infra*.)

7 & 8 Vict.
c. 44.

Manses in
quoad sacra
parishes.

The New Parishes Act of 1844, in reference to the erection of *quoad sacra* parishes, provides that the endowment for the minister shall not be less than £100 per annum, or 7 chalders of oatmeal, to be calculated at the highest fiars of the county, exclusive of the sum necessary for communion elements, "with a suitable dwelling-house or manse, and offices and appurtenances," or a stipend of £120, or $8\frac{1}{4}$ chalders, "where there shall be no such dwelling-house or manse." If there is a dwelling-house or manse form-

ing part of the statutory endowments, the title is to be taken in such way “that such dwelling-house or manse, and offices and appurtenances, shall be inalienably secured as the dwelling-house or manse, and offices and appurtenances for the minister of the said parish; and that due provision shall be made for the future maintenance of the fabric of such dwelling-house, &c., “all to the satisfaction of the Court” (sec. 8). Pew rents may be applied to upholding the fabric of the church and manse (sec. 9).

The Act of 1844 provides for two other cases, where Parliamentary charges, under 4 Geo. IV. c. 79 and 5 Geo. IV. c. 90, are erected under secs. 14 and 15 into (1) parishes *quoad sacra* under the Act, and (2) certain parishes *quoad omnia*. In the first case, the maintenance of the manses of such parishes is held to be sufficiently provided for under the Georgian statutes; and this provision so made is accepted as sufficient. All the Parliamentary charges erected under the Georgian statutes have now been erected under sec. 14 into parishes *quoad sacra*. In the second case (no instance of which occurred in practice) the provisions of those statutes are declared to cease and determine as to maintenance of “place of worship” and “dwelling-house,” “and the burden of upholding the same shall fall on the parties who by the law of Scotland would be bound to uphold the church and manse of the parish, if such church and manse had been appointed to be built for the newly erected parish” (sec. 15).

The minister is entitled to be entered upon the valuation roll as proprietor *qua* liferenter (*Cowan v. Gordon*, 1868, 6 M. 1018). In *Robbie v. Meiklejohn*, 1868, *supra*, Lord Ardmillan observed—

“Both Established Church ministers and Dissenting ministers are entitled to be enrolled as liferenters in respect of their manses.” During a vacancy the heritors are not liable in payment of assessments or rates, as they are not proprietors then any more than at

Manses are Parliamentary charges.

Minister entitled to be on valuation roll as proprietor.

Position as to rates during vacancy.

any other time. It is quite usual for heritors to place a caretaker within a manse during a vacancy, and to pay his wages and fire, &c., but this does not imply an assumption of ownership; the caretaker is in possession simply to prevent such dilapidation of the subjects as might increase the heritors' burden in the way of repairs. The same view would doubtless be taken of any similar occupancy by the General Trustees during a vacancy as regards occupiers' rates.

POSITION UNDER THE CHURCH OF SCOTLAND (PROPERTY AND ENDOWMENTS) ACT, 1925.

MANSES and churches fall under common scheme.

MANSES and churches are alike treated by the Act of 1925 as falling under a common scheme, the aim of which is to transfer the property in both, and the responsibility for the upkeep thereof, from those in whom the former has been vested and on whom the latter has rested to the Church itself as represented by its General Trustees. In the case of parishes *quoad omnia* the matter is regulated by Part III. of the Act, the general scheme of which is to provide that the building—church or manse, as the case may be—shall, first of all, be put into a “reasonable state of tenantable repair” by the heritors, and that it shall, on this being done, be transferred in property to the General Trustees of the Church of Scotland—the heritors, upon such transfer being completed, being relieved of any further responsibility for maintenance. In the clauses which give effect to this scheme the provisions are framed so as to apply to church and manse alike wherever their nature is such that it is appropriate that they should extend to the manse.

The provisions of Part III. in their application to the CHURCH have already been fully explained in Chapter IV., *supra*; and the relative sections have been quoted at length in such wise as to show their application to the MANSE as well as to the church. It is unnecessary, therefore, in this chapter to repeat the

language of the clauses in detail. It will be sufficient to state briefly the nature of the provisions, and to refer to the fuller exposition of the clauses already set out in Chapter IV.

Among the proceedings under sec. 3 of the Ecclesiastical Buildings and Glebes Act, 1868, the institution or entertaining of which before any Presbytery or Court of law or before the Commissioners is prohibited by sec. 27 of the Act (save as therein provided), unless instituted before 1st February, 1925, are proceedings relating "to the building, rebuilding, repairing, adding to, or other alteration of . . . MANSES, or to the designing or excambing of sites therefor or to the suitable maintenance thereof . . ." This prohibition is, however, without prejudice to any such proceedings, instituted before the date mentioned or to the enforcement of orders, &c., made, given, or pronounced therein, or to contracts or agreements made before that date by heritors, or to any resolution passed by heritors to levy an assessment to meet expenditure incurred in pursuance of such contract or agreement. Any such assessment is recoverable as if the Act of 1925 had not been passed. (See sec. 27.) In place of the proceedings thus superseded, sec. 28 of the Property and Endowments Act provides machinery for the putting in repair and subsequent transfer to the General Trustees of the manses of *quoad omnia* parishes. Where the General Trustees are of opinion that any manse is not in a reasonable state of tenantable repair, and that the duty of executing repairs is incumbent upon heritors, they may agree with the heritors concerned (a) for the repair of the same by and at the expense of the heritors, or (b) for the payment by the heritors to the General Trustees of a sum of money in lieu of repair. Failing agreement, the General Trustees may, within three years after the passing of the Act (*i.e.*, before 28th May, 1928),^{2a} apply to the Sheriff of the county within which the manse is

31 & 32 Vict.
c. 96.

Stay of proceedings under sec. 3 of Ecclesiastical Buildings, &c., Act, 1868.

Substituted provisions under Act of 1925.

(i) *Quoad omnia* parishes.

(a) Where agreement.

(b) Failing agreement.

^{2a} See note at the end of this chapter, *infra*, p. 311.

situated for an order directing the heritors to carry out such repairs (not entailing structural alterations) as the Sheriff may consider necessary, or—if the General Trustees shall so require—to pay to them such sum of money in lieu of repair as he may determine. The Sheriff may deal with any such application in a summary manner, and his decision shall be final (sec. 28 (1)). While the circumstances that “the General Trustees are of opinion,” *inter alia*, “that the duty of executing repairs is incumbent upon heritors” is a preliminary to the setting in motion of the statutory machinery, it cannot be supposed that their opinion is conclusive as to the duty. The question is, in case of dispute, one for the Sheriff to determine. A nice question on which the Act affords no express guidance is as to the incidence of the duty in the case of a manse which has been declared “free.” It is thought that this would not necessarily be conclusive against liability on the part of the heritors, and that the circumstances of each particular case should be considered. Even where a minister has fully attended to that maintenance of the manse against ordinary wear and tear which is his duty, it may very well be (especially where a number of years have elapsed since the declaration of freedom) that defects have arisen which the heritors under the common law would have been liable to rectify. (See, *e.g.*, Lord Kinloch’s observations as to failure of a water supply in the *Earl of Cawdor v. Ross*, *supra*, p. 277.) And in such cases there is no reason to suppose that the obligations of the heritors have been abrogated.

Are the provisions applicable to a “free” manse?

As the duty of the Sheriff in applications under sec. 28 (1) and (2) is somewhat analogous to that which formerly rested on him under the Ecclesiastical Buildings, &c., Act, 1868, in appeals as to repairs, there seems to be no reason why, if he thinks proper, he should not make a personal inspection of the subjects (as he was required to do under sec. 13 of the 1868

Act). But probably a report by a man of skill acting under remit will generally be the preferable procedure in case of dispute as to what repairs are required and exigible.

It will be observed that the provision cited contemplates in the first instance an adjustment between the General Trustees and the heritors by agreement, and the resort to proceedings by way of application to the Sheriff only on failure to come to an agreement. The initiative in the matter no longer lies with the minister and Presbytery, but with the General Trustees; and it will clearly be their duty to satisfy themselves in each case in which in their opinion the duty of executing repairs is incumbent on the heritors that a manse is in (or is put into) "a reasonable state of tenantable repair" before steps are taken for its transfer to them. It is, therefore, necessary that the General Trustees should be advised as to the existing state of repair, and as to what is necessary in order to bring the manse into conformity with the statutory standard. In general, it will be necessary to enable them to do this, that they should obtain a report on the subject from a person skilled in such matters. And it would appear, upon the principles approved and given effect to in the case of the *Presbytery of Deer v. Heritors of Pitsligo*, 1876, 3 R. 975, that, whether the report so obtained be accepted by the heritors or not, the reasonable cost of obtaining it should be payable by the heritors as a sum due by them to the General Trustees, "because of the necessity of" the latter "calling in an expert to advise them in an important step of public duty." (Cf. per Lord President Inglis at p. 978.)

Competency of agreements.

General Trustees necessary parties to such.

Heritors' responsibility for fees of skilled reporter employed by Trustees.

What should be regarded as "a reasonable state of tenantable repair" will fall to be judged of in the light of the circumstances of each particular case. But guidance will doubtless be found, in the application of this standard, in the principles which have been discussed in the cases relating to repairs under

What is "reasonable state of tenantable repair"?

Does not
include
structural
alterations.

the former law enumerated and considered in the earlier part of this chapter. It must be kept in view, however, that what can now be required from the heritors in the way of repairs is subject to the limitation that they can only be called on for such repairs as "do not involve structural alterations." This limitation obviously may rule out many things which under the former practice might have been claimed as incidental to any extensive scheme of repair on a manse for which the heritors might be liable. But it will not extend to exclude "structural renovations," as to which see *supra*, p. 293. For a judicial indication of the meaning attaching to "structural alterations" and "reasonable state of tenantable repair," see *Church of Scotland General Trustees v. Ardnamurchan Heritors*, 1927, 44 Sh.Ct.Rep. 83; 1928 S.L.T. (Sh.Ct.) 3.

Among the adjuncts of the manse which the General Trustees are entitled to have made over to them in a reasonable state of tenantable repair is the existing water supply. And for the reasons stated above (pp. 278, &c.) it is thought that they are entitled to get this existing supply free of any expense incidental to its provision, whether by way of capital or annual charge (except where the provision is from a public source in respect of which water rates are payable by owners and occupiers irrespective of their use of the water—see the *Prestonpans* case, *supra*, p. 278). A question of some nicety has arisen in connection with water supply in a number of instances in course of negotiations for transfers of manses under sec. 28, where the water supply, at present quite adequate, is, however, derived from lands external to the manse or glebe, under an arrangement with an adjoining heritor, or other proprietor, but where continuance is more or less precarious, either from possibility of failure of the source, or, more commonly, because of the absence of a permanent title or servitude established by prescription. In such a

case, are the heritors bound before the manse is accepted as in a reasonable state of tenantable repair to furnish a permanently available supply secured by an effective servitude? It is thought that they are not. Any demand for a new source would appear to be inconsistent with the ban on structural alterations. And as regards precariousness of title for the future, the answer seems to be that the test is reasonable tenantable condition for the present. Presumably the supply, such as it is, has been such as for the time being to meet the obligation to provide a "competent manse," and, if there be no immediate prospect of its withdrawal, the manse is at the time appointed for transfer, as regards water supply, in a reasonable state of tenantable repair. (Cf. *Earl of Cawdor v. Ross* (Ardersier), 1868, 39 Jur. 553.) That it may in the future cease to be so is nothing to the point in regard to this any more than in regard to other incidents of comfort. It is therefore thought that, wherever there is at present a subsisting arrangement under which at the cost of the heritors a satisfactory supply is available, the immediate continuance of which there is no reason to doubt, the heritors do all that is incumbent on them if they make over to the Trustees such right as they have to the supply, with a sum which will meet or redeem the charge therefor—this being in effect the cost of the provision of the necessary supply.

Where repairs are so extensive as to preclude the comfortable occupation of the manse by the minister and his family, a sum in name of manse maill for provision of other accommodation while the repairs are being carried through would seem to be a proper part of the cost of putting the manse into a reasonable state of tenantable repair falling on the heritors, just as it would have been at common law. The provisions of the Act as regards manse maill in the larger sense of a sum payable in lieu of a competent manse are considered, *infra*, p. 307.

Sum may be
accepted in
lieu of
repairs.

It will be noted, too, that an option is given to the General Trustees to obtain from the heritors concerned a sum of money "in lieu of repair"—the amount of which may be fixed by agreement or may be determined by the Sheriff on application to him, as in lieu of the amount requisite to carry out the repairs which he might otherwise have considered necessary. The object of this provision is to meet a case in which for one reason or another it may be found inexpedient to expend a sum of money in repairing a manse, or (say) part of its offices where the conditions are such that it may be found desirable to substitute a new manse for that presently existing or to abandon certain portions of outhouses or offices as unsuited for present-day requirements.

Powers of
compromise
(a) by General
Trustees.

Sec. 28, as has been seen, obviously contemplates arrangements between the heritors and the General Trustees. In some cases, probably, such arrangements may most usefully in practice be come to by negotiations locally between the minister or the Presbytery and the heritors concerned. Such negotiations are indeed to be encouraged. But it must be kept in view that the ultimate responsibility for agreement must, on the side of the Church, rest with the General Trustees, who are the only parties authorised for the purpose of sec. 28 of the Act to bind the Church. Under sec. 28, and by virtue of the powers of compromise or settlement conferred on them by sec. 37, the Trustees have ample powers in arranging with heritors. On the other hand, it would seem that the heritors, in meeting duly assembled, may competently come to agreement in course of carrying out the provisions of the Act even by a majority vote, provided that the resolution come to is within the limits of honest and reasonable compromise. (See *supra*, pp. 64 and 110; *Boswell v. Duke of Portland* (Mauchline), 1834, 13 S. 148.) (See also note at the end of this chapter.)

(b) by
heritors.

On the other hand, while heritors may quite reason-

ably in course of executing repairs agree *ex gratia* to do work beyond that which they can in strict compliance with the Act be called upon for, it is thought that the cost of such repairs cannot, so far as plainly beyond the strictly legal requirements, be thrown upon any heritor or heritors who decline to acquiesce in it.

By sec. 40 provision is made for cases (which are generally, though not necessarily, found in the case of parishes with a burghal area attached) in which at the passing of the Act a payment is made by heritors in lieu of a manse. This usually owes its origin to an agreement under which where a manse has not been provided or has been found by an incumbent at his entry to be in a condition which would have entitled him to have it rebuilt or repaired at great expense, the minister and heritors have concurred in an arrangement that the heritors generally, or some of them, shall make a periodical payment which the minister shall accept in lieu of the provision of a manse. The terms of the section are—

40.—(1) Where in any parish manse maill is at the passing of this Act payable in lieu of a manse the heritors legally liable in payment thereof shall redeem the manse maill by payment to the General Trustees of a sum equal to the annual amount thereof multiplied by twenty, such redemption payment to be made within five years after the passing of this Act.

(2) Where a manse has been sold and the price invested and the income from the investments representing the price paid to the minister, those investments shall within five years after the passing of this Act be transferred to the General Trustees, and on the completion of the transfer any liability of the heritors in respect thereof shall cease.

As has been pointed out (*supra*, p. 283), there seems to be no good reason for regarding the operation of sub-sec. (1) as excluded merely because the minister

Redemption
of payments
made in lieu
of manse.

Redemption
of manse
maill, &c.

to whom the payment is made has been left in possession of the manse such as it is. The payment is none the less one which has been made and accepted in lieu of that "competent manse" which the heritors would otherwise have been bound to provide, their liability for which is superseded by the Act. "The heritors legally liable in payment" may be either the heritors generally or particular heritors who have become responsible under an agreement.

Application
for certificate
of fulfilment
of obligations.

As in the case of the church, so in that of the MANSE of a parish *quoad omnia*, any heritor concerned or the General Trustees may under sec. 28 (2) apply to the Sheriff of the bounds for a certificate that all obligations incumbent on the heritors with respect to the MANSE have been fulfilled, and the Sheriff shall deal with the application in a summary manner and shall issue a certificate to that effect if (1) the General Trustees state or admit that all such obligations have been fulfilled, or if (2), failing such statement or admission, he is satisfied either (a) that any agreement or order made as aforesaid has been implemented, or (b) that notwithstanding the absence of any such agreement no application has been made for such an order within three years after the passing of this Act, or that any application for an order so made has been refused. The certificate may be in or as nearly as may be in the form set out in the Eleventh Schedule to the Act,³ and shall contain or refer to a description of the subjects whether church or MANSE to which it relates, and may be recorded by the General Trustees or by any heritor concerned in the appropriate Register of Sasines. Its effect when recorded in the Register of Sasines is to transfer all rights of property in the subjects to the General Trustees as if a complete feudal title holding of the Crown in feu blanch for a penny Scots yearly if asked only had been constituted in their favour. While the feudal title will thus be in the Trustees, it is thought that the beneficial interests

³ See Appendix I., p. 595.

will, until otherwise provided by the General Assembly, remain as formerly, and that questions arising as to, *e.g.*, liability for rates, will fall to be dealt with on this footing.

For an account of the general scheme of the Property and Endowment Act for dealing—in the main through the Scottish Ecclesiastical Commissioners appointed by the Act—with the case of manses in parishes other than the old *quoad omnia* parishes, reference is made to the chapter dealing with churches, Chapter IV., at pp. 149, &c., *supra*.

In the case of the “BURGH CHURCHES” enumerated Manse of
burgh
churches in the Ninth Schedule to the Act, among the matters into which under sec. 22 (1) the Commissioners are directed to inquire are “all circumstances relating to existing rights of property in the fabrics and sites of,” *inter alia*, any MANSE or other subjects connected with “these burgh churches, and any funds, endowments, pew rents, or assessments from which . . . the maintenance of the churches and other subjects and any other expenditure in connection therewith is defrayed.” And they are directed to frame schemes for “the future ownership, maintenance, and administration of the burgh churches and other subjects.” Sec. 22 (2) directs that every such scheme shall make provision for (a) the transfer to the General Trustees of all rights of property vested in or belonging to the magistrates or town council of any of the burghs within which the burgh churches are situated of, *inter alia*, “any MANSES and other subjects connected therewith”; and (c) the periodical payment to the General Trustees “(so far as the Commissioners consider this to be equitable and reasonable) of all sums which are at present paid or payable by the magistrates or town council of any of the said burghs in respect of the ownership and maintenance of the fabrics and sites of,” *inter alia*, “the MANSES or other subjects connected therewith”; and (d) the redemption of such periodical payments. In estimating under sec. 22 (2)

(c) the periodical payments hitherto paid or payable by magistrates in respect of maintenance, it would seem unreasonable to regard these as having been reduced by the proceeds of seat rents unless in so far as these may have yielded a surplus after meeting all the expenses of the decent celebration of divine worship in the church from the sittings in which the rents are derived. (See *Clapperton v. Edinburgh Magistrates*; 1840, 2 D. 1385.). The machinery for giving effect to the provisions is, in so far as applicable, just the same as that directed to meet the case of the churches, and it is sufficient to refer to the explanation which has been given of it in Chapter IV. at pp. 149, &c. The provisions restrictive of the alienation of burgh churches in secs. 22 (2) (h) and 28 (3) do not appear to apply to manses.

Manses of
"Parliamentary"
charges.

Similarly with regard to the case of MANSES of the "PARLIAMENTARY" CHURCHES enumerated in the Tenth Schedule to the Act, for the transfer of which to the General Trustees the Commissioners are by sec. 21 (1) (b) directed to make orders, it is unnecessary to do more than refer to the account of the operative provisions given in Chapter IV. at pp. 158, &c., *ante*; as the inquiries which the Commissioners are directed to make and the orders for transfer to the General Trustees which they are directed to issue apply equally to "the fabrics and sites of the said churches and manses" and to all powers and duties with respect to the maintenance of "the said fabrics." The same observation applies *mutatis mutandis* with regard to the manses in the GAELIC-SPEAKING charges erected into parishes *quoad omnia* under the New Parishes Act, 1844, and enumerated in the Eighth Schedule to the Property and Endowments Act, which are provided for by secs. 21 (1) (c) and 24 of that Act. As to these, reference is made to Chapter IV., pp. 161, &c., *ante*.

7 & 8 Vict.
c. 44.

In the case of a parish *quoad sacra* the applicability of the provisions of sec. 34 of the Property and

Endowments Act to its manse (if any) depends on whether the manse is part of the "statutory properties and endowments of the parish." It is so (sec. 34 (4) (ii)) "where a manse has been permanently provided under the said Acts" (the New Parishes Act, 1844, the United Parishes Act, 1868, and the United Parishes Act, 1876) "as part of the endowment of the minister of the parish." Where this is so, the manse and also (sec. 34 (4) (iii)) "any feu-duties, ground annuals, bonds of annual rent, or other heritable securities permanently provided and secured at the time of erection or subsequently substituted with the sanction of the Court of teinds for," *inter alia*, "the maintenance of the manse or payment of the feu-duty thereof" form subjects which in the case of parishes erected before the passing of the Act of 1925 are to be transferred to the General Trustees, or subjects the titles of which in the case of parishes erected subsequently are to be taken in name of these Trustees, under sec. 34, all as is explained fully in dealing with the parallel case of churches in such parishes in Chapter IV. at pp. 165, &c., *ante*.

Note.—In a remarkably large number of instances—about 800 in all—the questions arising under sec. 28 (1) as to the repairs of, or payments in respect of, churches and manses, &c., have been settled without the intervention of the Sheriffs, in most instances as the result of friendly conference between representatives of the heritors and the General Trustees. But there remain over a considerable number of cases—probably upwards of 80—in which it is obvious that it will be necessary for the General Trustees, in order to keep matters open, to apply to Sheriffs for orders under the section before the expiry on 28th May, 1928, of three years from the passing of the Act. The fact of presentation of such applications will not of course foreclose the possibility of settlements being still arrived at by negotiation, which will render the judicial pro-

ceedings before the Sheriffs merely formal in such cases. But the cases which remain unsettled are naturally just those in which questions of difficulty have emerged. And it is therefore probable that some considerable number of them may properly require to be made the subject of judicial decision. The strikingly large number of instances in proportion to the whole number of parishes (884) in which settlements have been reached testifies to the essential reasonableness and good feeling which has prevailed on both sides in the dealings between the heritors and the General Trustees.

CHAPTER VIII.

GLEBE. MINISTERS' GRASS.

GLEBE, the land belonging to a cure, from Old French *glebe*, "glebe land belonging to a parsonage" (Cotgrove), from Latin *gleba*, soil, a clod of earth, allied to *globe* (Skeat).

MINISTER'S GRASS: pasture land for one horse and two cows, designable from church lands to a parish minister.

SOM, measure of land expressing the relative proportion of cattle or sheep to pasture, or *vice versa*. A soum of grass = as much as will pasture one cow and five sheep. Probable derivation Anglo-Saxon *seom*, French *somme*, *onus*, *sarcina*, a burden, or quantity. Cf. Swedish *sum* = *tal* number, which is represented in Scottish by *soume*.—JAMIESON.

THE minister of a LANDWARD or of a BURGHAL-LANDWARD parish is entitled to a GLEBE of 4 acres of arable ground or 16 "soums" of pastureland, over and above half an acre of manse ground, and to "MINISTER'S GRASS," *i.e.*, land sufficient to provide for two milk cows and a horse (Ersk. B. ii. tit. 10, sec. 59, 62; Stair, B. ii. tit. 3, secs. 4, 40). Cook, "Church Styles," 1882, says a soum consists of as much land as will pasture one cow or *ten* sheep (p. 204). "If there is a landward district annexed to this parish, it is clear that the minister is entitled to a glebe" (Lord President Inglis, *Magistrates of Arbroath v. Presbytery of Arbroath*, 1883, 10 R. 767). Erskine's statement of the law is—"But the ministers even of royal burghs, where any part of the parish lies in the country, have right to a GLEBE." The decision of Lord Maclaren, as Lord Ordinary on the Teinds, at a later stage of the *Arbroath* case (reported as *Cumming and Others, Heritors of Arbroath v. Thomson*, 1883, 20 S.L.R. 781), implies that the "part of the parish lying in the country" or "the landward district annexed to the parish" must be a part not embraced within the bounds of the burgh as defined in its charter, if the minister is to be entitled to a glebe.

Minister of parish having a landward district is entitled to a glebe, &c.

Arbroath case.

In the *Arbroath* case the boundaries of the royal burgh and the parish were identical, and included within them parts of the burgh muir and other lands which had for long been formed into farms which were held feu of the burgh. Notwithstanding this, and the existence of some 5 acres of similar land outwith the burgh boundary, Lord Maclaren held that the parish was still a burghal one, and that there was no right to glebe. In the later case of *Alpine v. Heritors of Dumbarton*, 1907, 45 S.L.R. 63, 15 S.L.T. 489, Lord Mackenzie, as Lord Ordinary on the Teinds, in a careful judgment in which he considered the *Arbroath* case and the earlier authorities, stated the law to be that, where there is any substantial area of agricultural land in a parish beyond the limits of the land comprised in the burgh charter, the parish must be treated as a burghal landward one, and the minister was entitled to a glebe. In the case of *Dumbarton* he held that the existence of an admitted area of 300 acres in this position was sufficient to require him to treat the parish as such.

Dumbarton
case.

Principal
statutes as
to glebes.

The principal statutes applicable to glebes are 1563, c. 8 [72]; 1572, c. 5 [48]; 1592, c. 10 [116]; 1593, c. 8 [161]; 1606, c. 6 [7]; 1644, c. 31; 1649, c. 45; 1663, c. 31 [21]; 7 & 8 Vict. c. 44; 29 & 30 Vict. c. 71; 31 & 32 Vict. c. 96; 37 & 38 Vict. c. 94, sec. 36; 1 & 2 Geo. V. c. 26, sec. 26 (3) (a); 4 & 5 Geo. V. c. 48, sec. 16; and 15 & 16 Geo. V. c. 33.

Order of
liability of
lands for
designation
as glebe.

In the case of glebe, primarily (and in the case of ministers' grass, solely), the lands liable to designation for this purpose are kirk lands—*i.e.*, parsons' or vicars' lands first, abbots' or priors' lands, friars' and bishops' lands, and other kirk lands thereafter (*Nicholson v. Earl of Galloway* (Whitburn), 1823, 2 S. 398).

In the case of *Ogston v. Stewart* (Banchory-Devenick), 1896, 23 R. (H.L.) 16, the House of Lords held that where a glebe had been designated in 1602, when the Act 1563, c. 8 [72], was still in force, in the

absence of direct evidence as to the lands from which the glebe was taken, it was to be inferred that it was taken from the abbots' lands rather than from bishops' lands, the presumption being that the Presbytery in making the designation had followed the direction of the Act 1563, c. 8 [165]. But in an original designation of grass glebe by a Presbytery, it was held in *Minister of Panbride v. Maule*, Jan. 25th, 1815, F.C., that the onus was on the minister to prove in case of dispute that the designed lands were in fact church land even in a question with a sole heritor in the parish who did not dispute that there were church lands in the parish.

GLEBES and MANSES are ALLODIAL subjects with no superior, and each incumbent succeeds the other without service or any other form of an *aditio hæreditatis* (Stair ii. 3, 4; Ersk. ii. 3, 8; Lord Neaves in *Presbytery of Selkirk v. Duke of Buccleuch* (Yarrow), 1869, 8 M. 121, at p. 131).

The right emerges with the minister's admission to the benefice (*M'Callum v. Grant* (Leith), 1826, 4 S. 527).

A minister of a BURGHAL PARISH is not entitled to a glebe nor to minister's grass. Nor, it is thought, is the second minister of a collegiate charge, although the abstract point may not have been expressly decided. (See *Panmure v. Presbytery of Brechin* (Brechin), 1855, 18 D. 197, at p. 203, per Lord Currie-hill).

A glebe may be either—

(1) A glebe proper, or

(2) A grass glebe. The latter term is sometimes used also to describe "minister's grass."

Kinds of glebe :
"proper"
and "grass."

A glebe proper consists of 4 acres—adjacent to the parish church—of arable land—i.e., of land adapted for cultivation, even although not yet tilled (*Macmillan v. Presbytery of Kintyre* (Kilcalmonell), 1867, 6 M. 36; *Grierson v. Ewart*, 1778, Mor. 5162, 1781. 2 Hailes, 888).

Extent.

Where there are not 4 acres of arable land to be obtained, a grass glebe takes its place. It consists of 16 souns—each soun being equivalent to one-fourth of an acre of arable land. A minister is not entitled to have a grass glebe designed from land once under regular course of cultivation, although for two years laid out in grass on a lawn, and more suited for pasture than agriculture (*Macmillan v. Presbytery of Kintyre, supra*).

“Glebes”
other than
those under
statute.

Stranraer
case.

Glebe is sometimes used to describe a portion of land, the use of, or the revenue from, which is enjoyed by a parish minister, although not under the provisions of any statute relative to glebes. In the *Stranraer* case (*Wilson v. Officers of State*, 1826, Shaw's Teind Cases, 88) a minister had secured to the benefice 30 acres of land, and the revenue from those lands and houses thereon was enjoyed by his successors in the cure. One of these in 1826 asked the Court to give him compensation in respect that he had no legal glebe. The Court refused the demand, as he had a sufficient provision of land.

Wilton case.

In the case of *Wilton* the Court had on two occasions to consider an instance of a “glebe” exceptional both in character and extent. There was attached to the benefice a tract of land (commonly called “glebe”) the origin of which was obscure. In 1827 an application was presented to the Court of Teinds for an augmentation of stipend, which is reported under the name of *Stevenson v. Duke of Buccleuch* (1827, Shaw's Teind Cases, 137). At this time the Court held that the annual value of the lands—which were then let for agricultural purposes—must so far as they exceeded a glebe of ordinary extent be taken into account, on the ground that the glebe and the money and victual payments must be regarded as having been originally established as contributing a competent provision for the minister. The ordinary glebe was taken to be 12 acres in extent, and the remaining 83 acres brought in a rent of £221 12s.,

which at the prices of victual then ruling was equivalent to about 9 chalders. The Court then modified the stipend at 6 chalders, which with the rent from the 83 acres gave the minister a stipend equivalent to about 15 chalders. The glebe was situated close to the town of Hawick, and in course of time about 85 acres were feued under the Glebe Lands Act, 1866,^{29 & 30 Vict. c. 71.} for building, and the gross return from feu-duties and agricultural rents had by 1925 come to be about £1000 per annum.

In view of the imminent passing of the Property and Endowments Act, the minister thought it proper in the interest of the benefice to bring a process of augmentation before the Act should become law. This stage is reported as *Minister of Wilton v. The Heritors*, 1925 S.C. 372. The minister maintained, on the authority of the case of *Kilmarnock (Leck v. Heritors of Kilmarnock*, 1875, 3 R. 32), that the feuing return from the glebe was not an element to be taken into account in dealing with an application for augmentation. The heritors resisted the augmentation claimed. In the argument for them it was maintained that Wilton was a unique parish, not subject to the ordinary rules as to glebes. There was no evidence that the land in question had been mortified, and it was pointed out that it was not called "glebe" either in *Stevenson's* case, *supra*, or in the references to that case in the later case of *Stewart v. Lord Glenlyon* (Blair Atholl), 1835, 13 S. 787. In the earlier process the Teind Court had made certain declaratory findings with regard to the character of the lands, one of which was that the Wilton glebe "must be presumed to consist of land which formed part of the original (pre-Reformation) endowment of the Wilton benefice." These declaratory findings, the Lord President (Clyde) and the majority of the First Division who concurred with him, held must be accepted by the Court as truly setting forth the character of this glebe. Having regard, therefore, to "this peculiar, if not unique,

character of the Wilton glebe as established by the case of *Stevenson*," the majority of the Court, consisting of the Lord President and Lords Skerrington and Constable, held that the minister had not made out a case for any augmentation. . Lord Sands dissented, and in his judgment entered into a full and interesting examination of the history of the lands so far as known, as a result of which he concluded that "it seems improbable that a farm bearing the name of the Mains of Wilton, as the present glebe appears to have done, consisted of lands which before the Reformation were the ordinary and immemorial glebe of the parson of the parish." He was, accordingly, "unable to accept the view that in modifying a stipend for this parish we are to treat the revenue from feus of the superfluity of the glebe as if it were stipend from teind." He therefore dissented from the decision of the Court. But he intimated that he would not have been prepared to deal with the case on the footing that the revenue from the land must be regarded only to the extent to which it would have arisen from ordinary agricultural land. Apart from feuing value, proximity to a town gave to such land revenue-producing capabilities which ought to be regarded. Dealing with the matter as one in which the Court had a wide discretion, he intimated that his view was in favour of an augmentation of 3 or 4 chalders being one to which the minister was entitled.

Peculiar
favour shown
in regard
to glebes.
Yarrow case.

The peculiar favour shown to churchmen in regard to their glebe is well illustrated in the case of *Yarrow (Presbytery of Selkirk v. Duke of Buccleuch, 1869, 8 M. 121)*. The Presbytery of Selkirk raised an action against the heritors of the parish of Yarrow for declarator that a portion of a farm was the parochial glebe. The land had in 1641 been designed as a glebe, but the decree of designation had been lost, and the minister had remained in actual possession of the glebe till 1723. Subsequently the manse was

removed to a distance, and the minister received an annual money payment from the proprietor of the farm in question and his tenants for possession of the glebe. In 1764 the proprietor sold and conveyed the whole farm, including the glebe, to the predecessor of the defender, with an exception from a clause of absolute warrandice that £8 6s. 8d. was payable to the minister for the glebe. For upwards of forty years prior to the date of the action the whole farm was possessed by the tenants of the proprietor, and during that period the successive ministers on various occasions stipulated for and obtained from the proprietor of the farm and his tenants an increase in the money payment for the glebe. It was held that the constitution and subsistence of the minister's right to the glebe had been proved, and that it was not necessary for him to produce a title, or to bring a proving of the tenor, and that the minister's civil possession excluded prescriptive possession adversely by the proprietor of the farm.¹

Where there was no glebe, or one of insufficient (less than legal) size the minister's course was to apply to the Presbytery. The Presbytery gave notice to the heritors of their intention to visit the parish on a certain day. When an appropriate piece of ground had been selected, the Presbytery obtained a full and adequate description of its boundaries from a man of skill; and again visited the lands to hold a perambulation. The Presbytery thereafter pronounced a deliverance designating the glebe, or the portion to be attached to it to make it of legal size. No infeftment was required. Any question as to boundaries or as to the liability to designation of the land designed thereafter fell to be decided by the civil Courts—the

Former procedure to obtain glebe, or to have one of inefficient size enlarged.

¹ For a somewhat similar case which has been dealt with by the Scottish Ecclesiastical Commissioners under the Property and Endowments Act, 1925, in the exercise of their powers under sec. 30, reference may be made to the Order of the Commissioners, No. 15, of date 25th July, 1927, relating to *Polwarth* glebe, the right to a part of which, alleged to have been acquired by excambion early last century, and possessed by successive ministers who had let it to tenants of the heritor, was unsuccessfully disputed by the present heritors.

Presbytery not being a competent Court for this (*Marquis of Queensberry v. Gibson* (Lochmaben), 1829, 7 S. 418). Inquiry in regard to such a matter may appropriately be conducted by proof before the Sheriff of the district within which the land in dispute is situated. If action be raised in his Court, the Court of Session will not readily countenance an attempt to remove it to that Court. In the case of *Lochlee (Dalhousie's Tutors v. Minister of Lochlee*, 1890, 17 R. 1060) it was *held* by the First Division of the Court of Session that in construing a Presbytery's decree (of 1803) giving effect to an excambion of a glebe, it was competent, in order to explain the meaning of the decree, to adduce parole evidence as to the natural configuration of the ground and the boundaries described in the decree, and to ascertain the local situation of natural features set forth in it; but that it was incompetent to adduce evidence of possession inconsistent with its terms. On appeal, the House of Lords affirmed the judgment, being unanimously of opinion, however, that the decree of 1803 was unambiguous (1891, 18 R. (H.L.) 72).

Rights and obligations preserved by Property and Endowments Act, but procedure altered.

The substantive law as hitherto existing in regard to glebes has not been modified or abrogated by the Property and Endowments Act to the same extent as has that regulating the provision of churches and mansees. By sec. 30 of the Act provision is made for securing implement by the heritors "of any obligations incumbent on them according to the present law and practice with respect to the provision and enlargement of a glebe." So that acquaintance with the nature and measure of these obligations as defined by that law therefore continues to be practically important. But the former procedure, as explained above, is no longer available, implement of the obligations being now obtained through the Ecclesiastical Commissioners in manner hereinafter explained (*infra*, pp. 348 *et seq.*).

The choice of the ground to be designated was guided chiefly by its nearness to the church. But the minister was entitled to point out to the Presbytery which of two or more plots nearly equally adjacent was the more suitable. Assuming all to be more or less similar in character, the choice of the Presbytery would fall to be guided by what were church lands, and what temporal. Preferably the glebe fell to be taken from the former as constituting the patrimony of the church prior to the Reformation. Lands formerly held by Knight Templars or Knights of St. John are not church lands, whether incorporated in one or not (*Duncan v. Parishioners of Kilpatrick Easter* (Kilpatrick Easter), 1698, Mor. 5140; *Ross v. Vassals*, 1700, Mor. 7985). Situation of glebe.

In the term "church lands" there have been held to be included lands the superiorities of which were in the clergy prior to the Reformation, although the actual property might have passed from them before that time (*Minister of Kingsbarns v. Hay* (Kingsbarns), 1799, Mor., Glebe, App. 2). If the glebe be taken from church lands, the heritor from whose lands it is taken has a claim of relief against the heritors of church lands in the parish, but not against the heritors of temporal lands, and *vice versa* where the glebe is taken from temporal lands (Stair, ii. 3. 40). What included in "church lands."

It has been remarked that the doctrine proceeds evidently on the assumption that, when the glebe is designed out of temporal lands, this implies the absence of designable church lands, but that as temporal lands may have been selected instead of church lands on account of greater proximity to the church or manse, it seems scarcely consistent with the spirit of the Act 1644, c. 31, to exempt the heritors of church lands from liability in relief. On the other hand, there can be no doubt that the terms of this Act are quite specific. The Act ordains that the whole heritors of the parish shall "contribute proportionally for making recompense to the heritors out of whose Contribution by other heritors.

lands the said manse and glebe shall be taken respectively, viz., heritors of kirk lands where kirk lands are designed, and the heritors of all lands of other holding when the designation is of other lands not kirk lands." Although the actual Act 1644, c. 31, was among those abrogated by the Recissory Act, its terms probably exemplify the prevalent practice which had established itself. And the Act 1663, c. 31 [21] (which is declared to be operative as if passed on 14th March, 1649), provides for relief "according to the former Acts of Parliament standing in force." The right of relief was a personal one; it did not attach to proprietors (*Snow v. Hamilton*, 1675, Mor. 10167); it was good against the representatives of persons from whom it might have been claimed proportionally to their valuations, but not against their singular successors.

Church lands mortified to a University liable to designation *primo loco*.

"Incorporated acres."

Excambion of glebes.

As has been already pointed out, in dealing with the designation of land for the site of a manse, church lands mortified to a University are liable to be designated for such a site and also for GLEBE *primo loco*; and, in order to have the benefit of the exemption from designation given under the Act 1663, c. 31 [21], to "incorporated acres," lands in a town must be shown to be built upon or laid out in gardens, and other lands near the kirk must have been offered in their stead (*St. Andrews University Court v. Presbytery of St. Andrews* (St. Leonard's), 1905, 22 Sh.Ct.Rep. 209).

The GLEBE may be EXCAMBED; the authority of the Presbytery was requisite prior to the passing of the Property and Endowments Act, 1925. For the situation now, see *infra*, pp. 346, &c. It was (and will still be) highly proper that the heritors and minister should also approve of the exchange of lands (1649, c. 45; *Stewart v. Glenlyon*, 1835, 13 S. 787; but see, *infra*, *Bain v. Lady Seafield*, second case (1887)).

The decree of the Presbytery was not a judicial determination, but merely gave the sanction of the Presbytery to the transaction. The title in the new glebe flowed from the contract of excambion, but it

was the decree of the Presbytery which impressed the excambed land with the character and status of a glebe (*Caddell v. Allan* (Carriden), 1905, 7 F. 606).

Glebe lands proper are teind-free under the Act 1621, c. 10. But in *Baird v. Earl of Wemyss* (Haddington), 1906, 8 F. 669, a new glebe was designated in 1776 out of lands belonging to A, to whom the lands of the old glebe were given in exchange for the lands of the new glebe. In connection with this excambion, A agreed that all teind payable from his whole lands (including the new glebe) should be a burden on his remaining lands, and the Presbytery, in designing the new glebe, took an obligation from A to relieve the minister and his successors from all public burdens, including teind. In an interim scheme of locality the common agent, in his statement of the teinds of A's successor in the lands, deducted the teind of the land forming the glebe. It was held by Lord Pearson (Ordinary), and acquiesced in, that the transaction of 1776 had not the effect of making the new glebe teind free, so as to affect the rights of the heritors *inter se*, but merely gave the minister a right of relief.

In *Wallace v. University Court of St. Andrews* (St. Leonard's), 1904, 6 F. 1093, the circumstances were that a glebe was designated in 1827. The minister did not enter into possession, but received a money payment from the heritors "in lieu of" the lands. In 1854 the lands so designated were excambed for other lands; but no infeftment or possession by the minister ever followed upon the charter of excambion, and the minister continued to receive an annual payment from the heritors down to 1863, when the payments ceased to be made. In 1893 the then minister raised an action for declarator that the lands designated to his predecessor in the charter of excambion were the glebe of the parish, and pertained heritably to him and his successors, with conclusions for removing against the proprietor of the estate out of which the lands had been assigned. It was, however, held that, as the

Effect of obligation to relieve of teind over new glebe.

Excambion unless followed by possession is ineffectual against singular successor in excambed lands.

excambion had been followed by neither sasine nor possession, actual or constructive, on the part of the minister, no heritable right to the lands had been acquired, and that the right remained with the proprietor of the estate who had possessed for the prescriptive period on a habile title.

Deed of excambion should be recorded.

In case of excambion, a deed of excambion should be duly executed, although an excambion under verbal agreement has been recognised by the Court (*Bremner v. Officers of State* (Walls and Flottay), 1831, 9 S. 838). Great care should be exercised in the preparation of such a deed. In the case of *Duthil* (*Bain v. Lady Seafeld*, 1884, 12 R. 62), the Presbytery of a parish, with the concurrence of the minister, entered into an excambion, whereby they conveyed to a heritor a part of the glebe, the churchyard, and the site of the church. The deed proceeded on the narrative that the portion of the glebe was conveyed with a view to the heritor planting and improving it, but the dispositive clause contained no such restriction. In a note at the instance of the minister for interdict against the heritor building a mausoleum on the excambied glebe lands, it was held (1) that the conveyance was absolute, and (2) that the minister was barred by his acquiescence in the granting of the deed from objecting to the heritor's title to the proposed site of the building. In a later case under the same name (*Bain v. Lady Seafeld*, 1887, 14 R. 939) it was held that the consent of heritors was not essential to a contract of excambion of glebe lands.

Messis sementem sequitor applies to crops on glebes.

Where a minister has a crop on the glebe at the time of his death, his representatives will receive (or, in the event of his transference to another cure, he himself receives) the fruits, following the brocard *messis sementem sequitor*. In the case of a minister dying, say, on 1st February, it is thought that his executor is entitled to a crop of hay, though not sown that year, if it be the fruit of seed sown by the minister at some time. If the glebe be let to a tenant, the crop

sown belongs to the tenant, and rent for the portion of the year to which belongs the crop sown at the time when the minister's incumbency ends falls to the minister's representatives (*Taylor v. Stewart* (Wilton), July 12, 1853, 2 Stuart, 538).

A minister may cut down trees on the glebe (*Logan v. Reid* (New Cumnock), May 11, 1799, F.C.). But before doing so he will be well advised to procure the opinion of a man of skill, and to notify the Presbytery (and now also the General Trustees), as conservators of the benefice, of his intention. An undertaking to plant an equal number of trees, so as to preserve the value of the land for his successors, might not unreasonably be required. In England an incumbent may only cut timber for the purpose of repairing the buildings on the benefice, or he may, in the case of timber cut at a distance from the site of the repairs required, apply the proceeds of the sale of this in the purchase of other timber to be used for the repairs.

A minister may also dig peats (*Mercer v. Minister of Lethendy*, 1789, mentioned in *Minister v. Heritors of Newton*, 1807, Mor., Glebe, App. 6). The minister is entitled himself to enjoy the benefit of such cutting of trees or digging of peats as does not involve actual dilapidation of the benefice. (Cf. *Logan v. Reid*, *supra*.) He may also work marl, and even coal, but in both these cases the proceeds are to be applied for the benefice (*Minister v. Heritors of Madderty*, 1794, Mor. 5153; *Minister v. Heritors of Newton*, *supra*). The price of the produce of such workings should be accumulated, and the income of the fund so brought together paid to the minister who serves the cure. Where certain lands had been held for over two centuries by trustees "for the use and benefit of the minister of the gospel serving the cure at the Kirk of Bo'ness," and in 1888 the minerals therein were leased for twenty years at a yearly rent of £25 or royalties, the Court held, in a special case between the trustees and the minister of the parish, that the mineral rents or

Right to cut timber.

Right to dig peats and to work marl and coal.

royalties should be accumulated and the income paid to the minister. Those lands were not glebe, but the principle applied was the same as is applicable to glebe (*Galbraith v. Minister of Bo'ness*, 1893, 21 R. 30).

Walls or
fences round
glebe.

As the minister enjoys the whole benefit of the glebe, it does not appear that he is entitled to ask the heritors to build a WALL round it. If a FENCE be around the glebe when he enters upon the benefice, it is thought it is his duty to maintain it if he requires it, just as he may maintain a road or footpath, which may (like a wall or fence) contribute to his lucrative enjoyment of the glebe. To maintain his fence or wall is incident to the minister's right to the glebe, just as is his payment of road and school assessment *qua* proprietor of manse and glebe. This was the view of the late Sir John Rankine, K.C., who wrote ("Landownership," 3rd edn., p. 670)—"Where a glebe has once been provided, it is difficult to conceive of any further burden resting upon the heritors by way of maintenance, unless it be to keep up the fences and access and to provide a new glebe if the old one become, in the words of the rescinded Act of 1644, unprofitable by inundation, sanding, or any other extraordinary accident. In the absence of decisions on these matters, it may be conjectured that there is no obligation of the former sort (*i.e.*, to keep up fences, &c.), and that nothing short of absolute destruction or sterility will bring the latter into play." In *M'Douall v. Lowrie* (Stoneykirk), 1905, 22 Sh.Ct.Rep. 66, and 1907, 24 Sh.Ct.Rep. 331, it was held that a minister is bound to erect and maintain the fences of the glebe-marches conjointly with neighbouring proprietors when called upon to do so by any of them. This obligation, it would appear, will for the future rest on the General Trustees, when the ownership of a glebe has been vested in them under the Act of 1925, probably, however, subject to relief from the minister as the party beneficially interested as life-renter during his incumbency. But where a new glebe

is first designated, as in the case of *Dumbarton (Alpine v. Heritors of Dumbarton, 1907, 45 S.L.R. 63, 15 S.L.T. 489)*, the Court ordered a wall to be built by the heritors. The case of *Dunnett v. Heritors of Kilmar-nock, 1906, 21 Sh.Ct.Rep. 360*, in which the "ownership" of a glebe abutting on a burgh street was considered in relation to the liability of the minister and heritors respectively for the cost of paving a foot-path, has already been noticed (*supra*, p. 95).

As regards the upkeep of an ACCESS ROAD, in the case of *Kilbrandon (Macphail v. Kilbrandon Heritors, 1914 S.C. 1015)* it was not necessary to decide the question of the responsibility of the heritors for maintaining the access to the glebe as such, as the access to the manse passed through the glebe; but the opinion of the Lord Ordinary on the Teinds (Ormidale) is consistent with the view above expressed that, while the heritors must in the first instance provide an access, once it is provided their obligation is exhausted, and it lies on the minister himself to maintain it.

The "ownership" of a minister in his glebe is sufficient to enable him to acquire by possession a title to SALMON FISHINGS in water *ex adverso* of the glebe. Thus, in the case of *Loch Broom (Gilmour v. Sutherland, (O.H.) 1900, 38 S.L.R. 561)*, a glebe lay along the shore of a loch and river, but there was no trace of a formal designation. The minister and his predecessors had no feudal title to salmon fishings *ex adverso* of the glebe, but from time immemorial they had *de facto* possessed this salmon fishing as part of the benefice. The Crown made no claim on the fishings. In an action by the proprietor of the opposite shore, it was held by Lord Kyllachy (Ordinary) that the minister was entitled to the benefit of the rule *decennalis et triennalis possessor non tenetur docere de titulo*, and must be presumed to have a valid title.

A lease of the minerals underlying a glebe might be taken as between the heritors of a parish, or a committee of their number, "as authorised and empowered

Upkeep of
access road
to glebe.

Ownership of
glebe suffi-
cient to found
right to
salmon
fishings *ex
adverso* in
suitable cir-
cumstances.

Lease of
minerals.

by the said heritors at a meeting held by them on the . . . day of . . . , to execute these presents on their behalf," the moderator and clerk of the Presbytery of the bounds, and the parish minister, all of the one part, and the parties, lessees, of the other part. A clause relative to the application of the rents or lordships was sometimes inserted in the following or similar terms:—"And with regard to the application of the rents or royalties that may be received by the first party under this lease, it is hereby provided that the moneys so arising shall be applied in the first place in payment of the charges and expenses of the lessors in and concerning the premises. In the second place, ten per cent. of the said annual rents or lordships on the coal hereby let, together with ten per cent. of the wayleave rent, shall be paid to the said Rev. A B and his successors in office in the cure of the said parish in respect of injury to the amenity of the glebe and personal inconvenience and trouble occasioned to them. And, lastly, the whole residue of the said rents and lordships shall from time to time be deposited in one or other of the Chartered or Joint Stock Banks of Scotland in name of (Heritors) *or* (Committee) *or* (Chairman of Committee), and of their clerk for the time being, until the same shall be invested from time to time in such way and manner as may be approved of by the said Presbytery of (the Bounds) and Heritors and Minister of the parish for behoof of the said minister and his successors in office in all time coming." In *Minister v. Heritors of Tranent*, 1909 S.C. 1242, the Court held that an out-and-out sale of minerals in a designated portion of the glebe for an agreed sum was competent, the approval of the Presbytery and heritors being, of course, given, and the price obtained to be invested at their sight for the benefit of the successive ministers of the parish of Tranent. See also *Cadell v. Allan* (Carriden), 1905, 7 F. 606, a case as to coal underlying the foreshore *ex adverso* of the glebe. The power of leasing will for

the future be exerciseable by the General Trustees, subject to the control of the General Assembly, as an incident of the right of administration vested in them as owners of the glebe under the Act of 1925 (secs. 30 (3) (b) and 37). In the exercise of their rights of administration, however, the General Trustees will doubtless find guidance from, although they will not be bound by, the precedents which have hitherto prevailed.

Until the passing of the Glebe Lands (Scotland) Act, 1866, no incumbent could sell or feu or lease, except for the term of his own incumbency, any glebe lands except—as in Govan and a few other parishes—in virtue of the powers conferred by special private Acts. Under this Act of 1866, the minister, with the consent of the heritors and Presbytery, was empowered to grant a lease or leases of his glebe, reserving five imperial acres nearest the manse for himself, to be marked out by the heritors and Presbytery. For the purposes of the Act the word “ heritor ” was defined as meaning a proprietor of lands within the parish to the extent of at least £100 of real rent as appearing in the valuation roll (sec. 2). The lease might not exceed eleven years, with no grassum; if the five acres above mentioned were included, the lease must contain a provision that, so far as those acres were concerned, the lease should end at the first term of Martinmas, six months after the death, deprivation, resignation, or translation of the minister. The heritors' and Presbytery's consent had to be evidenced by a certificate on each lease signed by the clerk to the heritors and the moderator and clerk of Presbytery. The rent was to be paid and belong to the minister. With the same consents the minister might sell for an annual payment of grain or money any servitude or right of pasturage over any lands possessed by him as minister. If the proprietor of the lands over which such right exists elected to purchase it absolutely, the purchase money had to be invested at the sight of the

Feuing, selling, or leasing glebe.

Glebe Lands Act, 1866, 29 & 30 Vict. c. 71.

Leasing under Act.

Sale of servitude, &c.

heritors and Presbytery on such securities and in such manner as the Court of Teinds directs, the interest and proceeds only being paid to the minister (secs. 3, 4). Moreover, with the same consents the minister might apply to the Court of Teinds for authority to feu the glebe, or to grant building leases thereon for any term not exceeding ninety-nine years (sec. 5). The conditions under which such authority might be granted were defined by subsequent provisions in the Act.

As under the provisions of the Property and Endowments Act, 1925, feuing, letting, or selling of the glebe will be dealt with by the General Trustees (subject only to the control of the General Assembly and to such restrictions, if any, as may be imposed by the Scottish Ecclesiastical Commissioners for preserving the rights of existing incumbents under sec. 30 (3) (g)) in the exercise of their powers of ownership and administration under secs. 30, 31, and 37 of that Act (for which see *infra*, pp. 348, &c.), it is not necessary to set out in any great detail the rules which have hitherto governed these matters under the Glebe Lands Act, 1866. This Act, though not expressly repealed by the Act of 1925, is practically superseded by the general repeal in sec. 48 of the Act of 1925 of so much of any other Act as is inconsistent with its provisions. The procedure under the Act of 1866 will be found set out at length in the last edition of this work.

Feuing under
1866 Act.

In granting authority to feu, the Court might (and usually did), subject to any conditions or restrictions which they deemed expedient, grant the required authority, and, in their order or interlocutor, fixed the minimum rate at which the glebe, or any portion of it, should be feued or leased for buildings, and authorised and empowered the petitioner and his successors in office, at the sight of the heritors and the Presbytery (subject to the provisions of the Act), to grant and dispose of the glebe or any part or parts thereof, in feu

farm, fee, and heritage, for the highest feu-duties, or in building leases for the highest rent in grain or in money that could be got for the same, not being less than the minimum above mentioned, and that either by public auction or private contract.² The Court might also authorise the minister to construct such streets, roads, passages, sewers, or drains in and through the glebe, or any part thereof, as the Court on inquiry might find reasonable or expedient, with the view of the more advantageous feuing or leasing of the glebe (sec. 14), but the cost of forming a new avenue to a manse, rendered necessary by the feuing of the glebe, was held in *Robertson, Petitioner* (St. Ninians), 1896, 23 R. 526, not to be such a charge as could be imposed as a permanent burden on the glebe.

The feu-duties and rents, and, in the event of any sales in fee-simple,³ the interest of the price, were taken payable to the minister and his successors in office serving the cure of the parish, and were recoverable by him or them. On the death of a minister, his representatives⁴ received the feu-duties and rents in the same manner, and for the same length of time, as is provided in the Act of 1672, c. 24 [13], as to ann. In the event of any circumstance causing a vacancy to be prolonged beyond the term during which a minister's widow, heirs, or executors have a right to the said feu-duties and rents, the heritors and Presbytery are empowered to uplift and apply these feu-duties and rents to the provision of spiritual superintendence and the supply of religious ordinances in the parish during the vacancy (sec. 15). The feu-duties and rents dealt with by sec. 15, described as "the said feu-duties and rents," are, it is thought, the duties and rents arising from feus and building leases granted under the powers conferred in the immediately preceding secs. 5 to 14, and do not include rents arising

Right of feu-duties and rents.

Abridgement, p. 291.

² Sec. 13. See *Blair Atholl* case, *infra*, p. 339.

³ See secs. 4 and 17.

⁴ "Widow, heirs, or executors."

from ordinary agricultural letting of the glebe, which are separately provided for, where falling under the Act by sec. 3. In the part of sec. 15 providing for the disposal of the feu-duties and rents after the death of a minister there is, it will be observed, no mention of the interest of invested moneys arising from sales as there is in the earlier part of the section. But in *Fyfe v. Thomson* (Dalry), 1919 S.C. 380, the Court held that interest on a bond representing a grassum paid in respect of a lease of minerals at a nominal rent was subject to ann as forming part of the "rent of the benefice or stipend" within the meaning of the Act 1672, App. 13. While this sum was not perhaps technically interest of money arising upon sale, it was so in substance; and it is difficult to distinguish it in principle from interest on an invested price. And it seems probable, therefore, that the latter would be held to be subject to ann. If so, it would seem that, where the vacancy is prolonged, it would fall to be applied under the further provisions of the section, subject to any claims upon it for the Ministers' Widows' Fund, the nature and extent of which are discussed *infra*, pp. 333, &c. Looking to the terms of the provisions of sec. 15 of the Act of 1866, the principles recognised in the case of *Latta v. Edinburgh Ecclesiastical Commissioners*, 1877, 5 R. 266, as generally applicable to ann, so far as arising from stipend proper, would appear to be equally applicable to the provisions therein contained for dealing with it when arising from the feu-duties and rents from glebes feued or let under the Act, with the result that the provisions of the Apportionment Act, 1870, would not extend to the case of such feu-duties or rents, or probably (though this is more doubtful) to the interest of the price resulting from a sale of the glebe in fee-simple. The right to ann is abolished in the case of future incumbents by sec. 9 of the Act of 1925. But this does not in itself seem to be sufficient to make the

Apportionment Act, 1870, does not apply to such feu-duties and rents.

33 & 34 Vict. c. 35.

Apportionment Act applicable to the payments in question. For the future the liability to apportionment will, in the case of new incumbents, probably be dependent on the terms of the particular arrangements come to between them and the General Trustees, under authority of the General Assembly.

The Ministers' Widows' Fund had not until recently any right in the proceeds of the glebe during a vacancy, these not being included within the gift to the fund under its Act of 1814 (54 Geo. III. c. 169) of stipend which had till then been applicable by the patron to pious uses during vacancy. By the Act of 1866, as has been seen, these proceeds, so far as arising from duties and rents from feuing or letting the glebe, were expressly disposed of otherwise on the death of an incumbent; and, even if this disposition did not extend (as it is thought it did) to interest on an invested price, the Act contained nothing which could be construed as giving a right to this to the collector of the fund. But under recent legislation the Widows' Fund has acquired a right during vacancies to the income arising from investments of moneys derived from certain transactions with glebes—the extent of which is in one respect not so clearly defined as it might have been. Under the Church of Scotland Ministers', &c., Widows' Fund (Amendment) Order Confirmation Act, 1926, "vacant stipend" falls to be paid during a vacancy for the period prescribed in the Order for behoof of the Widows' Fund. "Stipend" is defined under the Church of Scotland Ministers', &c., Widows' Fund Order Confirmation Act, 1923, in terms which are confirmed by the Order of 1926. The definition of "stipend" is "the whole annual fruits of the benefice, whether in the form of stipend proper (*exclusive* of the glebe as defined under the Glebe Lands (Scotland) Act, 1866"—(*i.e.*, by sec. 2 of that Act "the lands appropriated to the minister as his glebe, and any additional lands settled in perpetuity on the minister for the time being, and enjoyed

by him along with his glebe ”)—“ *but including* the income from proceeds of mines, quarries, or other industrial works on a glebe invested for the benefice), or the income of bequests, *funds*, or heritable property, where such income is assigned for the permanent endowment of the benefice, provided the fund is not expressly excluded from such income.” As matter of construction, it seems that the expression “exclusive of the glebe ” must be read as correlated to “the benefice ” (and not either to “fruits ” or to “stipend,” to neither of which is it apposite). So reading it, it seems clear (a) that the definition does not extend to cover feu-duties and rents arising from letting the glebe, whether for agricultural purposes or on building lease. These are not mentioned in the “including ” clause, and are already the subject of statutory provision in the Act of 1866. And it is also clear (b) that the income from the invested proceeds of mines, quarries, or other *industrial* works on a glebe fall to be treated as “stipend ” (these being expressly included), although it is difficult to account for the diversion of these in 1923 from the objects to which they had been assigned during a vacancy by the Act of 1866. But what is left in some doubt is the position of the income from the investment of moneys representing the *price of a glebe sold* under the powers in the Act of 1866. This is a *surrogatum* for the enjoyment of the glebe itself which did not formerly fall to the fund, and it is not mentioned among the subjects expressly included. On the other hand, it is not strictly within the definition of “glebe ” quoted above; and it is possible to regard it as “income of . . . funds . . . assigned for the permanent endowment of the benefice ” from which “the fund is not expressly excluded.” The line of reasoning which received effect in *Fyfe v. Thomson*, *supra*, is favourable to including such income under the definition of “stipend ” in the Order, and the right of the Widows’ Fund to it would probably be affirmed.

In the few parishes which were feued under private Acts, when a vacancy occurs the private Act may have to be carefully studied to enable parties to ascertain their rights. If the Act be silent as to the liability of feu-duties to be computed as stipend, and therefore subject to ann, the proportion of feu-duties from the death of one minister to the admission of another is payable to the heritors of the parish for pious uses. The minister's widow has no further right to the feu-duties of the glebe than her husband had, and his right ended with his death. The new minister has no right to the feu-duties until his admission to the benefice. Connell on "Parishes," p. 436, observes—"The disposal of the proceeds of a glebe during a vacancy only seems to have belonged to a patron, but was understood to accresce to the heritors under a similar obligation of bestowing them upon pious uses within the parish, and this right remains at present on the same footing." Ann is not payable out of the rents or produce of the glebe at common law or under statutes. Nor had the Ministers' Widows' Fund, apart from statute, anything to do with the glebe; the heritors were the only parochial ecclesiastical authority in temporal matters in a parish (apart from the minister), and as protectors of the benefice they were entitled to collect and administer the feu-duties; and, except to the limited extent to which such income falls under the provisions of the Widows' Fund Orders as just explained, they will continue to enjoy this right until the glebe has been transferred to the ownership of the General Trustees under the Property and Endowments Act. The Presbytery has no authority or right of interference. Pious uses are difficult to define. In *Donaldson v. Brown*, 1694, Mor. 9946, a gift to the last minister's widow and children was found to be a pious use, provided they dwelt within the parish at the time. The case of *Lord William Douglas v. Heritors of Mannour*, 1695, Mor. 9946, was one arising out of a quarrel between the patron and the heritors. It

What are
"pious uses."

was held that the patron who had destined vacant stipend for building a bridge in the parish was applying the money "to an uncontroverted pious use within the parish," but it does not appear that the heritors' action in proposing to allocate it for repairing the church and manse was wrong in purpose, although wrong in law owing to the destination proposed by the patron being preferable. It appears from *Lord Saltoun v. Lady Pitsligo*, 1700, Mor. 9948, that a Presbytery explained pious uses within the parish to be "the repairing the church and manse that were ruinous, the building a bridge, and the maintaining the poor," while the patron of the kirk allocated the vacant stipend to repairing the harbour of Fraserburgh; the majority of the Lords "preferred the Presbytery and parish to the harbour," and found that pious uses must be ascertained "within the parish." Education was also a pious use. But in the present day, as education, poor relief, the building of bridges, and other like parish purposes are provided for by statute, it would seem reasonable to hold that pious uses may now most fitly be found in church extension work within the parish, and perhaps in the preservation of the gravestones of the parishioners, for which it does not appear there is a power of assessment. But the repair of the church and manse would not be excluded.

Provision for costs of application and of construction of streets, drains, &c.

The sums paid on account of the glebe disposed of as above fall to be enjoyed by the minister in place of the natural possession of the glebe, or of the rents, maills, duties, and profits of the glebe, subject always to the burden of payment of interest on the cost of applying for and obtaining the above order or interlocutor from the Court and incidental thereto, and of making and constructing the streets, roads, passages, sewers, or drains sanctioned by the Court. These costs might be decerned by the Court on the summary application of the minister on the granting of the order, or at any time thereafter, or of his heirs,

executors, administrators, or assignees, to be a permanent burden upon the glebe—the interest, until extinguished, as provided in sec. 19, or otherwise, forming a first charge on the whole produce and revenue of the said glebe. Provision for dealing with discharging and extinguishing these charges must, under sec. 30 (3) (*d*) of the Property and Endowments Act, 1925, be incorporated in the orders of the Ecclesiastical Commissioners transferring glebes to the General Trustees under that Act.

After the minister had feued out or let on building lease, or sold the glebe or any part of it in virtue of the Act, it was not competent to him or to his successors in office to make any demand upon the heritors to provide him with a glebe, or any portion of land in lieu of the glebe land so feued, leased, or sold. But nothing in the Act precludes or prejudices any claim which the minister may have to any additional glebe that might have been competent to him if the Act had not passed (secs. 16 and 18)—*i.e.*, if the minister's glebe was not of the full size, his claim to have a glebe of the legal size (inclusive of the portion disposed of under the powers of the Act) was reserved to him.

When the Court had made an order or interlocutor granting authority to feu or let on building lease, and fixed the minimum feu-duty or rent, any proprietor whose lands were conterminous with the glebe mentioned in the order might, within thirty days of the date of the order, intimate his willingness to feu or lease, or to purchase so much of the said glebe at such a rate of feu-duty or rent or price as the Court might determine on consideration of the whole circumstances of the case, and after directing such inquiry as they might consider necessary. If he proposed to feu or lease, the conterminous proprietor had to undertake (in his intimation) to grant security over the whole or such part of his estate in addition to the glebe itself, as to the Court should seem necessary, for the regular

Rights of
conterminous
proprietor
where power
to feu or let
on building
lease granted.

and punctual payment of the feu-duty or rent fixed by the Court, and on such intimation, and after the rate of feu-duty and security therefor or price had been so fixed, the Court, in case of feuing or leasing, interposed its authority to the bond or other writ in security, and decerned accordingly, and in case of sale pronounced a decree of sale thereof in favour of such heritor (*i.e.*, conterminous proprietor), on which he was entitled to obtain a charter from the Crown for payment of a blench duty of a penny Scots, and interposed their authority accordingly. The heritor was not entitled to obtain an extract of the decree of sale until the price was consigned in one of the chartered banks in Scotland⁵ for behoof of the minister; and in every case of such sale the price, after deduction of all expenses connected with the application to the Court, fell to be invested at sight of the heritors and Presbytery on such securities and in such manner as the Court of Teinds directed, and the interest or proceeds only paid to the minister (sec. 17 of Glebe Lands Act, 1866).⁶ Provision is made by sec. 37 of the Property and Endowments Act, 1925, for suitable protection of the interests of conterminous proprietors in the event of feuing or selling of a glebe or part thereof in the future by the General Trustees, as to which see *infra*, p. 516 and App. I., p. 575.

Sec. 37 of
Property and
Endowments
Act.

Casualties of
superiority to
go to form
sinking fund
to pay off
charge for
expenses.

So long as any burden (for expenses of application or of drains, &c., sec. 18) remained unpaid, the casualties of superiority payable under any contracts,

⁵ Bank of Scotland, Royal Bank, and British Linen Company.

⁶ The section continues—"And it is provided further, that it shall be lawful for any heir of entail in Scotland to burden the lands and estate of which he or she is in possession as heir of entail lying contiguous to such glebe for the amount of such price, or to give security over the same for the annual payment out of the clear yearly rents and profits of the said lands and estate, the interest of such sum calculated at four and one-half per centum, or the amount of such annual payment, not exceeding three pounds per centum of such clear yearly rents and profits after deducting all prior burdens and provisions, as the same shall be ascertained by an average of the five years immediately preceding the creation of such burden or security." See *Gloag v. Rutherford* (Galashiels), 1873, *infra*; *Campbell v. Morison* (Balmerino), 1868, *infra*; *Fogo, Petitioner* (Row), 1868, *infra*; *Minister of Rattray*, 1868, *infra*.

dispositions, or charters of feu, or writs by progress for entering heirs or successors granted under the provisions of the Act, as well as any payments received from grantees in respect of the construction of roads, sewers, or drains, fell to be invested, at the sight of the heritors and Presbytery, on such securities and in such manner as the Court of Teinds approved as a sinking fund to meet the said burden, the interest of the fund being payable to the minister for the time being. As soon as the fund amounted to a sum sufficient, the burden was to be paid off, the casualties of superiority thereafter due forming part of the income of the minister, and being payable to him (sec. 19).⁷

All deeds granted by the minister with consent of the heritors and the Presbytery, as certified by the clerk to the heritors and the moderator and clerk of the Presbytery, were declared to be as legal titles as if granted by a proprietor or superior with a completed feudal title holding immediately of the Crown; subjects feued, conveyed, or leased under the authority of the Act were subject to payment of poor rates, "any law or custom to the contrary notwithstanding"; and contracts and other deeds fell to be recorded in the books of the heritors (sec. 20). It is said to have been the practice in some parishes to engross all deeds also in a minister's chartulary, but it does not appear that any legal charge could be made against a feuar for such engrossment. The purpose of the section was to provide a complete legal record. For certain alterations in the form of feu charter as approved in the *Penicuik* case (*Imrie, Petitioner*, 1868, 6 M. 284) rendered necessary by the Conveyancing Act, 1874, see *Browne, Petitioner*, 1875, 2 R. 488.

In the case of *Macleod, Petitioner* (Blair Atholl), 1870, 8 M. 955, Lord Justice-Clerk Moncreiff observed — "I have no doubt that under the statute in question the power to grant feus of glebes was not intended to be restricted to feus for building, and I am led to that

Power to feu
not restricted
to feus for
building.

⁷ See *Mackie, Petitioner*, 1874, *infra*.

result, not only by the reason of the thing, but by the express words of the statute. . . . The statute draws very clearly in its phraseology the distinction between feus and building leases, and this runs throughout all the clauses relative to this matter."

Nor is the rule inflexible that where buildings are to be erected they are bound to be of the value of sixty years' purchase of the feu-duty. In the case of *Row (Fogo, Petitioner, 1868, 6 M. 970)*, the Court bound the feuars to erect buildings of the value of not less than forty-five years' purchase of the feu-duty. In 1925, in *The Minister of Row and Others, 1925 S.C. 381*, the process was reopened, when it appeared that two portions of the glebe had been feued for a feu-duty of £38 0s. 2d. each, on condition that a dwelling-house be erected on each feu, but that no buildings had been erected. A minute was presented by the minister and others, with concurrence of the vassal in the feus, craving the Court to sanction a partial redemption of the feu-duties upon the transfer of Consols to an amount yielding an equivalent return, to authorise the vassal to grant dispositions resigning the feus *ad remanentiam*, and to authorise the minister to grant charters of novodamus of the feus free from the obligation to erect dwelling-houses, and subject to a feu-duty of ten shillings for each feu. The Court granted the crave.

If a conterminous proprietor desires to acquire a portion of the glebe, as provided in the 37th section of the Act of 1866, the application should be made by him, not by the minister (*Imrie (Minister of Penicuik), Petitioner, 1868, 6 M. 284*). In *The Minister of Rattray, Petitioner, 1868, 5 S.L.R. 659*, where in the course of the process two conterminous proprietors intimated willingness to purchase in terms of that section, the Court preferred the higher offerer, although his offer was the later one. As to a feu to a conterminous heritor at a specified feu-duty, see *Minister of Wilton, Petitioner, 1868, 5 S.L.R. 631*.

In an application for authority to feu under this Act, the Court held (1) that, in fixing the minimum feu-duty, the building value and not the agricultural value fell to be taken; and (2) that the price to be paid by a conterminous heritor for lands taken under sec. 17 was twenty-five times the amount of the minimum feu-duty (*Campbell v. Morrison* (Balmerino), 1872, 11 M. 80).

The lodging of a minute by a conterminous proprietor, under the 17th section, intimating his willingness to purchase the glebe or any part of it, did not conclude a personal contract of sale between him and the minister, it being in the power of the Court, at any time before decree of sale was pronounced, to impose conditions for the protection of the benefice (*Gloag v. Rutherford, &c.* (Galashiels), 1873, 11 M. 251).

In *The Minister of Prestonpans, Petitioner*, 1905, 12 S.L.T. 463, it was held that where a decree of the Court of Teinds had authorised the feuing of a glebe for the erection thereon of "a dwelling-house or villa, one or more, with suitable offices," the erection of two-storeyed workmen's dwellings was permissible as sufficiently falling within this description.

Secs. 6 and 7 of the Act of 1866 require, as preliminary to an application to feu, that notice be sent to each "heritor"; and by sec. 2 "heritor" is defined as meaning the proprietor of any "lands" of a certain value within the parish. In the case of *Russell*, 1898, 5 S.L.T. 262, it was pointed out that, although the Interpretation Act, 1889, sec. 3, defines "land" as including "messuages, tenements, houses, and buildings," the practice of the Teind Court had been to restrict the notice to the owners of *agricultural* land only; and this was approved.

Although under sec. 17 the right of pre-emption is exerciseable only within thirty days of the interlocutor granting authority to feu, in the case of *Alva Parish Council, Petitioners* (Kelly, Minuter), 1923

Miscellaneous
points under
sec. 17 of
Act of 1866.

"Heritor"
for purposes
of notice
interpreted
as owner of
agricultural
lands.

S.C. 25, where a conterminous proprietor had, *with the concurrence of all parties interested*, lodged a minute fifty years after the date of the interlocutor granting authority to feu, the Court granted a decree of sale in his favour.

In the case of *Minister v. Heritors of Carriden*, 1910 S.C. 1131, a parish minister, having obtained the unconditional consent of the heritors to an application to feu part of his glebe, on a motion being made to the Court to approve of the feu charter adjusted by the teind clerk, one of the heritors appeared and moved that certain restrictive conditions be inserted in the charter. No opposition was offered by the minister. Nevertheless, the Court refused to insert the conditions on the motion of a single heritor, and continued the application in order that the consent of the Presbytery and the remaining heritors might be obtained.

Single heritor cannot insist on restrictive conditions.

Investment of moneys derived from feuing or sale of glebe.

Where a glebe had been feued under the Glebe Lands Act, the Court authorised a composition paid by a feuar, instead of being invested as directed by the 19th section of the statute, to be applied in part payment of a bond and disposition in security, which had been granted over the glebe for the expenses connected with the application for authority to feu (*Mackie, Petitioner* (Elgin), 1874, 1 R. 934).

In the case of *Forbes, Petitioner* (Haddington), 1922 S.L.T. 8, in a petition for authority to uplift consigned money representing the price of a glebe acquired by a public authority under powers in the Housing Acts, investment in $2\frac{1}{2}$ per cent. Government securities was sanctioned.

The heritors of Galashiels having built a new manse on part of the glebe, and the Presbytery having designed as glebe the site of the old manse and garden, authority was granted to the minister (the heritors appearing and consenting to the arrangement) to feu the site of the old manse and garden, under reservation of the right of the heritors to the fabric of the

old manse (*Gloag, Petitioner* (Galashiels), 1873, 1 R. 187).

The case of a UNITED PARISH containing more than one glebe, from which parish a disjunction and erection had been made of a portion into a parish *quoad sacra*, was dealt with by the Act 39 Vict. c. 11 (the United Parishes (Scotland) Act, 1876). The expression GLEBE is there defined to include GRASS GLEBE, or MINISTER'S GRASS, and ANY LAND SETTLED IN PERPETUITY on the minister for the time being.

Where *quoad sacra* parish erected not of portion of united parish having more than one glebe, one may be transferred to it.

The Act provides that if in the course of any proceedings under the Act 7 & 8 Vict. c. 44 (the New Parishes (Scotland) Act) for the disjunction of a portion of a united parish and for its erection into a parish *quoad sacra*, it appears that there is more than one glebe forming part of the benefice of the united parish, the Court of Teinds, upon sufficient evidence being produced of the consent of the Presbytery, may, in pronouncing decree of disjunction and erection, declare that one of the glebes, described by its marches and boundaries, and with its parts and pertinents, shall be transferred from the minister of the united parish to the minister of the *quoad sacra* parish, and be thereafter the glebe of such parish, the minister being invested with all those rights in relation to the glebe which were formerly vested in the minister of the united parish; the right of personal occupancy and enjoyment of such (transferred) glebe, however, continues with the minister of the united parish in office at the date of the decree, during his incumbency, unless by deed duly executed and lodged with the clerk of the Presbytery he renounces the right (sec. 3). The same provisions apply to the case of a portion of a united parish which has already been erected into a parish *quoad sacra* under the Act before mentioned, including the reservation to the minister of the united parish of the (transferred) glebe during his incumbency, unless he renounces his right (sec. 4). The GLEBE OF THE QUOAD SACRA PARISH is not subject to

the provision of any trust constituted under the Act 7 & 8 Vict. c. 44, subject to this proviso, that if a manse and offices are erected on such glebe, either before or after decree of disjunction and erection, or decree as aforesaid (*i.e.*, of transference of glebe), the site of such manse and offices is subject to the provisions of any trusts constituted in terms of that Act (sec. 5). Nothing in the Act increases or affects the existing liabilities of heritors in any parish, and the Act is to be deemed as incorporated with the New Parishes Act of 1844 (secs. 6 and 7). It has been decided that the 4th section of the above Act does not apply to the case of a *quoad sacra* parish, a small portion of which only had been disjoined from a united parish, and the rest from adjoining parishes (*Minister of Brydekirk v. Minister and Heritors of Hoddam*, 1877, 4 R. 798). Lord President Inglis expressed his opinion that the provision applied only in the case of a *quoad sacra* parish, the whole of which had been disjoined from the united parish.

8 Edw. VII.
c. 64.

The powers conferred on a landlord by the Agricultural Holdings Act, 1908, other than that of entering upon a holding for the purpose of viewing the state of the holding, are declared by sec. 28 not to be exerciseable by ministers in respect of their glebes except with the approval in writing of the Presbytery of the bounds.

How far is
feuing value
of glebe
relevant as
affecting
right to aug-
mentation?

Contrary to indications in some of the earlier cases, the possession of a GLEBE of uncommon extent and of unusual value may affect the amount of augmentation of STIPEND to be granted to a parish minister (*Minister v. Heritors of Old Deer*, Nov. 23, 1808, F.C.; *Stevenson v. Duke of Buccleuch* (Wilton), 1827, Shaw's Teind Cases, 137; *Stewart v. Glenlyon* (Blair Atholl), 1835, 13 S. 787; *Minister of Wilton v. The Heritors*, 1925 S.C. 372). In *The Minister v. The Heritors of Kilmalcolm*, 1875, 3 R. 32, it was decided by a judgment of Lord President Inglis, con-

curred in by Lords Deas, Ardmillan, Mure, and Craig-hill, as “ a question of considerable general importance,” that the revenue derived by a minister from feuing his glebe under the powers of the Glebe Lands Act, 1866, did not fall to be taken into account in considering as to augmentation, on the ground as expressed by the Lord President, that “ the statute under which alone the authority of the Court could be obtained to feu this glebe was undoubtedly a statute passed to benefit the existing minister and his successors in the charge. And it appears to me that if we were to adopt the view advanced for the heritors the practical result would be, not to benefit the minister and his successors, but to benefit the heritors where they have right to their teinds, and the titular where they have not. In short, the effect would be to give relief to the heritors and titular in proportion as the glebe is feued out. That was certainly not the purpose of the statute. . . . I am therefore for not taking into consideration the value of the feu.” The principle upon which Lord President Inglis rested his judgment, viz., that the feuing revenue arises, and can only arise, under a statute which contemplated the benefit of the minister and not that of the heritors or titular, would appear to be equally applicable whether the particular glebe be of normal or of exceptional extent and value, apart from the statutory powers of feuing. But in the second stage of the *Wilton* case (*Minister v. Heritors of Wilton*, 1925 S.C. 372) the Court of Teinds (Clyde, L.P., and Lords Skerrington, Cullen, and Constable—Lord Sands dissenting) held that in the special circumstances of that parish (for which see p. 317, *supra*) the feu-duties of the glebe lands so far as exceeding a glebe of ordinary extent (taken as 12 acres) must be taken into account in considering whether the minister was entitled to an augmentation.

MINISTER'S GRASS.

Minister's
grass: Who
are entitled
to this?

Alexander's
Abridgement,
p. 271.

The statutes relative to the provision of MINISTER'S GRASS are the Acts 1649, c. 45, and 1663, c. 31 [21], The latter provides "that every minister (except such ministers of royal burrowes who have no right to gleibs) have grass for ane horse and tuo kyne, over and above their gleib, to be designed out of kirklands, and with relieff according to the former Acts of Parliament standing in force; and if there be no kirklands lying neir the minister's manse, out of which the grasse for ane horse and tuo kyne may be designed, or otherwise, if the saids kirklands be arable land; in either of these caces, ordaines the heritors to pay to the minister and his successors yearly the sume of £20 Scots, for the said gras for ane horse and tuo kyne, the heritors alwayes being releived according to the law standing, of other heritors of kirklands in the said paroche."

Only exigible
if non-arable
kirk lands
available.

A minister who has a glebe, whether pasture or arable, is therefore entitled also to ground sufficient to pasture one horse and two cows, provided (1) that there is church land in the parish, and (2) that the church land is not arable land. In the case of a glebe the *preference* is merely given to church land, other land being available for designation if it is nearer the church or better suited to the case, but here the prohibition is absolute.

Alternative
provision
where no
church lands.

If there is no church land, or if it is arable, the minister is entitled to £20 Scots per annum in place of the minister's grass. This provision is obviously insufficient, but the Court have no power to increase it (*Carfrae v. Heritors of Dunbar* (Dunbar), May 13, 1814, F.C.—Lord Meadowbank dissenting).

As the provision of minister's grass is quite independent of the provision of a glebe (except that without right to a glebe a minister is not entitled to grass), it is no fatal obstacle to a minister's application for grass that he has already a glebe of larger extent

than he is strictly entitled to. The minister of Jedburgh, a cure with six acres of arable glebe since before 1663, was found entitled in 1805 to minister's grass; so, too, in 1811, the minister of Kilconquhar, with eight acres of glebe, was also admitted to have right to grass (*Dundus v. Somerville* (Jedburgh), 1805, Mor., Glebe, Appendix 5; *Bethune v. Small* (Kilconquhar), Feb. 2, 1811; Connell on "Parishes," 409). In the older case of *Borgue* (*Forbes v. Miller*, 1755, Mor. 5127), where from the union of three parishes three glebes were enjoyed by the minister, the Court refused to allow him also minister's grass; each glebe was less than the legal size, but taken together the glebes made up not only a full glebe, but in the opinion of the Court provided sufficient grazing for a horse and two cows.

The extent of ground to be designated is not specified in the Act of 1663. It has varied from four and a half acres in the case of *Oldhamstocks* (*Belshes v. Moore*, 1825, 4 S. 347, revd. 2 W. & S. 558) to twenty acres (of moorland) in the case of *Falkirk* (*Wilson v. Forbes's Trustees* (Falkirk), June 10, 1818, F.C.; 1 Sh.App. 249).

Extent of ground in satisfaction of right.

Numerous questions have arisen as to the definition of arable land. In an old case it was observed—"The Presbytery must not pitch on arable land that has been in use to be tilled, and the heritors must not, in *æmulationem*, till up what was in use to be lee" (*Steel v. His Parishioners* (Lochmaben), 1712, Mor. 5131; *Stiel v. Dalrymple* (Dalkeith), 1748, Mor. 5161; *Bruce v. Carstairs* (Anstruther Wester), 1826, 4 S. 626; see *Macmillan v. Presbytery of Kintyre* (Kilcalmonell), 1867, 6 M. 36).

No lapse of time bars a minister's claim to grass, provided the Presbytery has not sanctioned formally the substitution of the money payment for land; but that is an absolute bar. See *Minister of Dollar v. Duke of Argyll*, July 9, 1807, F.C.; Mor., Glebe, App. No. 7.

Right of relief
of owners of
kirk lands
inter se.

A heritor who has kirk lands from which the minister's grass is selected is entitled to relief from the other heritors of kirk lands in the parish, but not from the heritors of temporal lands also. When a provision in money is made, it is derivable in the first instance from proprietors of church lands nearest the manse and kirk, with a right of relief to them against heritors of other church lands in the parish, exigible in proportion to the valuation of their lands (*Durie v. Thomson* (Dunfermline), 1755, Mor. 5161). It does not appear that heritors of temporal lands are liable either with church-land heritors or in relief. But the payment is so small that the point is of almost no importance.⁸

PROVISIONS OF THE PROPERTY AND ENDOWMENT ACT,
1925, AS AFFECTING GLEBE, GRASS GLEBE, AND
MINISTER'S GRASS.

What
included in
"glebe" for
purposes of
1925 Act.

By the interpretation clause of the Act of 1925 (sec. 47) "GLEBE" is defined as meaning "the lands appropriated to a minister as his glebe, and SHALL BE DEEMED TO INCLUDE GRASS GLEBE OR MINISTER'S GRASS, SERVITUDES, RIGHT OF PASTURAGE, OR OTHER HERITABLE RIGHTS belonging to the minister and forming part of the benefice, or any money payments in use to be made to the minister in respect of the said rights or any of them, and any land settled in perpetuity on the minister for the time being."

Policy of Act
of 1925 as to
glebes.

The policy of that Act with regard to GLEBES differs somewhat from its policy in regard to such other parochial endowments or property as CHURCHES and MANSES. In regard to the latter, it has been shown in previous chapters that, except to a very limited extent, the obligations of the heritors for provision and

⁸ See Dr. Cook's "Church Styles" for forms of petitions to Presbytery or to the Sheriff relative to glebes, &c. The subject of the feuing of glebes, under the Glebe Lands (Scotland) Act, 1866, forms the second part of Mr. Elliot's work on the "Erection of Parishes *Quoad Sacra*" (1879).

restoration of these subjects were determined by the Act, unless in so far as action to enforce them had been instituted prior to 1st February, 1925. With respect to GLEBES, however, a different line has been taken. Provision is made for inquiry into claims that the obligations incumbent on heritors according to the former law and practice hitherto existing with respect to the provision and enlargement of a glebe have not been fully implemented by them, and, where this is found to be the case, for implement thereof. Such implement must, indeed, now be secured under the provisions of the Act of 1925, and not by means of proceedings under the Ecclesiastical Buildings and Glebes Act, 1868 (sec. 27 of 1925 Act). This implement has to be worked out under the powers conferred on the Commissioners in performance of a duty laid on them by the Act. Proceedings are initiated by the furnishing by clerks of Presbyteries of lists of glebes which they were required to furnish within one year of the passing of the Act. The lodging of these is followed up by inquiry by the Commissioners themselves "as soon as conveniently may be" "into all circumstances relating to existing rights of property in the glebes," and by Orders making provision "for the implement by the heritors of any obligation incumbent on them" "according to the present law and practice with regard to the provision and enlargement of a glebe." It is obvious that the result of these provisions is to accentuate and give immediate practical importance to those obligations resting on heritors as these exist at common law and under statutes prior to 1925. It is for this reason that it has been thought necessary to explain these with some fulness.

The necessity for inquiry marked the matter as one appropriate to be dealt with by the Ecclesiastical Commissioners. And, accordingly, one of the matters in regard to which the Commissioners may, under sec. 21.

after such inquiry in each individual case as they may think fit, make such orders as they may consider necessary or proper, is

Provisions of
Act regarding
glebes.

Sec. 21 (f) For giving effect to the provisions of the section of this Act relating to the transfer of rights in glebes.

The section here referred to is sec. 30, which is in these terms—

30. With respect to glebes, the following provisions shall have effect:—

Clerk of
Presbytery to
furnish to
Commissioners return
of glebes and
of relative
obligations
unimple-
mented.

(1) It shall be the duty of the clerk of every presbytery within one year after the passing of this Act to furnish to the Commissioners a list of the glebes appropriated to the ministers of the parishes in the presbytery, and of any cases where a minister has accepted or is entitled to any annual payment in place of glebe, and at the same time to intimate in which cases (if any) it is claimed by the presbytery (whether on the representation of the minister concerned or otherwise) that the heritors concerned have not fully implemented the obligations incumbent on them according to the present law and practice with respect to the provision and enlargement of a glebe:

Commis-
sioners to
inquire and
make orders.

(2) As soon as conveniently may be after the receipt of the said lists, the Commissioners shall inquire into all circumstances relating to existing rights of property in the glebes, and in any payments in place of glebe, and shall thereafter make orders relating to the glebes and payments:

Scope of
orders.

(3) Every such order shall make provision for—

(a) the implement by the heritors of any obligations incumbent on them as aforesaid

which have not already been implemented;
and

(b) the transfer to and vesting in the General Trustees of the ownership of the glebes;
and

(c) the preservation of the existing rights of all persons other than the heritors or the minister of the parish who, under or in pursuance of any general or local Act of Parliament or otherwise, have acquired any right in any glebe or any part thereof, whether as purchasers, feuars, or tenants, and the payment of any feu-duties, casualties, or rent to the General Trustees in place of the minister; and

(d) the manner in which—

(i) any burden upon the glebe created under section eighteen of the Glebe Lands (Scotland) Act, 1866⁹; and

(ii) any of the costs, charges, and expenses referred to in that section which have not been made a burden on the glebe⁹

may be dealt with, discharged and extinguished; and

(e) the transfer to the General Trustees of any feu-duties and Government or other securities or investments representing the price or consideration received for any

⁹ *I.e.*, the expenses of and incidental to the application for authority to feu, &c., and of making and constructing streets, roads, passages, sewers, or drains in or through the glebe or any part thereof, which might under the Act of 1866 be made a permanent burden upon the glebe until extinguished as therein provided for. The manner of dealing with provision for these will probably vary with the circumstances of each case. Where there has been extensive feuing, funds arising from redemption of casualties may suffice; in others mining royalties may be made available; and in at least one case by consent of the General Trustees the provision took the form of a terminable bond of annuity extending over a period of years.

4 & 5 Geo. V.
c. 48.

glebe or part thereof or right therein under or in pursuance of the Glebe Lands (Scotland) Act, 1866, the Feudal Casualties (Scotland) Act, 1914, or any other general or local Act of Parliament, or any decree of the Court of Teinds, or any grant or contract validly made by a minister and held by any persons acting as trustees in trust for the payment of the income to the minister of the parish; and

- (f) the conversion into a money payment of any right of pasturage over any lands which is possessed by the minister as minister of the parish, and the redemption of that money payment, if the heritor or heritors concerned so desire, in such manner as may be agreed upon between the General Trustees and such heritor or heritors, or as, failing agreement, may be fixed by the Commissioners; and
- (g) the protection of the interests of the ministers or assistants and successors who at the passing of this Act are incumbents of the benefice of any parish.

Redemption
of feu-duty
exigible for
glebe feued.

The redemption of feu-duty affecting the glébe is provided for by sec. 31, which is in these terms—

31. Where the glebe or any part thereof has been FEUED to the proprietors of conterminous lands in terms of section seventeen of the Glebe Lands (Scotland) Act, 1866, and the feu-duty payable therefor has been transferred to the General Trustees by an order made by the Commissioners, the said proprietors or their successors shall be entitled to redeem the feu-duty affecting the glebe or any part thereof—

- (a) for such consideration or in such manner as may be agreed upon between the person liable and the General Trustees; or

(b) at any term of Whitsunday or Martinmas after three months' notice either—

(i) by payment to the Trustees of such a sum as would, if invested at the time of payment in Consolidated $2\frac{1}{2}$ per cent. annuities produce an annual sum equal to the feu duty; or

(ii) by transfer to the General Trustees of such an amount of Consolidated $2\frac{1}{2}$ per cent. annuities as would produce an annual sum equal to the feu duty.

The orders of the Commissioners in regard to glebes shall have effect as if enacted in the Act and may be recorded in the Register of Sasines.

In the case of PARISHES QUOAD SACRA, it is provided by sec. 34 (4) (ii) that where a glebe has been permanently provided under the Acts applying to the erection of such parishes as part of the endowment of the minister of the parish, such glebe is included within the meaning of the expression, "the statutory properties and endowments of the parish," which under sec. 34 (1) fall in the case of parishes erected prior to the passing of the Act of 1925 to be transferred to the General Trustees, and of which the titles under sec. 34 (2) fall in the case of parishes erected after that date to be taken in the name of the Trustees. The details of these provisions have been already sufficiently explained in dealing with their application to churches and manses (*supra*, pp. 167, &c.).

Glebes of
parishes
quoad sacra.

CHAPTER IX.

PROCEDURE IN APPLICATIONS RELATING TO ECCLESIASTICAL BUILDINGS AND GLEBES.

I. PROCEDURE PRIOR TO THE PROPERTY AND ENDOWMENTS ACT, 1925.

31 & 32 Vict.
c. 96.

Procedure
from 1869 to
1925 under
Ecclesiastical
Buildings
and Glebes
Act, 1868.

THE Ecclesiastical Buildings and Glebes (Scotland) Act became law on 31st July, 1868; and from that date till 1st February, 1925, the procedure in relation to the building, rebuilding, repairing, adding to, or other alteration of churches or manses, or to the designing or excambing of sites for such buildings, or of glebes or additions to them, or of sites for or additions to churchyards, and the suitable maintenance of churchyards, including the building or repairing of churchyard walls, when any heritor or the minister of the parish was dissatisfied with any order pronounced by a Presbytery having reference to such matters, was regulated by that Act. The remedy open to a dissatisfied heritor, or the minister of the parish, when a matter falling under sec. 3 of the Act called for settlement, was by appeal to the Sheriff of the county in which the parish was situated, or if the parish was situated within more than one county, then by appeal to the Sheriff of either county. In the course of nearly sixty years the Sheriffs decided in the aggregate a very large number of cases under the Act. It is impossible to be assured of the procedure followed in each case, or to ascertain the circumstances, or all the decisions themselves; and, having regard to the supersession of applications relating to the matters mentioned in sec. 3 of the Act of 1868 by the

provisions of sec. 27 of the Property and Endowments Act, 1925—which in effect veto the institution or entertaining of any proceedings in such matters under the Act of 1868, unless where these have been commenced prior to 1st February, 1925—it is now unnecessary to make any particular inquiry into the circumstances of or procedure in these cases. A considerable amount of interesting information regarding them will be found collected in Chapter VIII. of the last edition of this work.

This superseded by 15 & 16 Geo. IV. c. 33, sec. 27.

Nor does it seem to be either necessary or desirable to restate, except in the merest outline, the lines of procedure laid down in the Act of 1868 itself. For any proceedings under that Act so far as still competent to be entertained must already have been initiated long ago, and must now have reached such an advanced stage as to render any suggestions as to procedure superfluous.

In regard to the matters mentioned in sec. 3 of the Act of 1868 (noted above), the authority of the Presbytery of the bounds as the appropriate Court of the Church to deal in the first instance with application regarding these matters was not interfered with by the Act. But provision was made for an appeal being taken by the MINISTER or ANY HERITOR who was dissatisfied with any order, finding, judgment, interlocutor, or decree pronounced by the Presbytery, and such appeal on being intimated to the clerk of the Presbytery had the effect of staying the Presbytery from taking any further steps in connection with the proceedings. The appeal took the form of a summary petition to the Sheriff of the county in which the parish concerned (or a part thereof) was situated to stay the proceedings before the Presbytery and to dispose of the same himself. After intimation in manner prescribed, the Sheriff was directed to inquire into the circumstances and hear the parties by themselves or their agents, but without any written plead-

Sketch of superseded procedure.

ings unless these were specially ordered by the Sheriff. The Sheriff was, however, to take a note of the proceedings and of any evidence led before him, and then to dispose of the petition as should seem to him to be just. In an application for rebuilding a church or manse, the Sheriff was empowered to decide as to whether the church or manse should be repaired or a new church or manse should be built, unless this had already been decided by the Presbytery by an order not brought under stay by appeal timeously taken. The Sheriff was also empowered to employ and make such remits to architects and other men of skill as might be necessary in course of the proceedings. If required, the Sheriff was however bound to make a personal inspection of the premises or locality (sec. 13). His decree was given the same effect as that of a Presbytery in regard to designations or excambions and to the declaring of a manse "free," subject, however, in the case of excambions, to the consent of the Presbytery of the bounds being given to the excambion (secs. 11 and 12).

Provisions
for assess-
ment of costs
incurred in
operations of
repairs, &c.

By sec. 9 the Sheriff, in dealing with proceedings for repair of a church or manse, was empowered to "find the heritors who are now liable in the expense of such building, rebuilding, or repairs," and to "assess and allocate the same together with a sufficient sum to cover the expenses of collection upon them according to their respective real rents as these shall appear on the valuation roll or rolls in force at the date of such assessment or allocation, or according to their valued rents, as the case may be," and to grant decree for payment thereof in such instalments and under such conditions as he should direct. All orders, decrees, &c., pronounced in regard to the said matters by the Sheriff were declared to be final unless appealed from within twenty days from the date thereof to the Lord Ordinary in Teinds causes. If so appealed from, the decree, &c., might be reviewed by the Lord Ordinary in Teinds causes, who, in dealing with the appeal, was

declared to have all the incidental powers which the Sheriff had under the Act, and his decision was final and not subject to review (secs. 14 to 20).

Sec. 23 provided that " All assessments for the purpose of defraying expenses " connected with the matters enumerated in sec. 3 should " be imposed in manner aftermentioned upon all lands and heritages within such parish according to the yearly value thereof, as the same shall appear in the valuation roll or rolls in force in such parish at the time when such assessments are made or according to the valued rent of such lands and heritages, as the case may be; and such assessments shall be imposed and recovered according to the present law and practice; provided, however, that when the area of any parish church heretofore erected has been allocated among the heritors according to their respective valued rents, all assessments for the repair thereof shall be imposed on such heritors according to such valued rent." Nothing in the Act contained was to have the effect of extending or increasing the burdens which had previously rested by law upon the minister or heritors of any parish in respect of any of the matters dealt with in the Act, nor of exempting from or rendering liable to assessment any person or property not previously exempt from or liable to assessment (secs. 23 and 24).

Provision for assessment for costs incurred.

In the last edition of this book, which was published in 1901, shortly after the passing of the Ecclesiastical Assessments (Scotland) Act, 1900, it was pointed out that some difficulty might possibly be experienced in the application of the provisions of that Act to a case in which the Sheriff had in proceedings before him assessed the heritors under sec. 9 of the Act of 1868 for the expenses of operations appointed by him to be done. Under the Act of 1900, in a parish where assessments had according to use and wont been imposed on the valued rent, but where it would be competent to impose assessments on the real

63 & 64 Vict. c. 20. Were the provisions of the Ecclesiastical Assessments Act, 1900, applicable in all cases where assessments imposed by the Sheriff on basis of real rent?

rent, the valued-rent heritors were themselves empowered under the Act of 1900 by a two-thirds majority in value to determine that the amount should be imposed according to the valued rent, and that in that case it should be so imposed, any law to the contrary notwithstanding. In such a case the Sheriff would presumably, apart from any such vote, assess on the valued rent as being the use and wont. And even if he did otherwise, it would appear that the valued-rent heritors might have resolved in favour of it, as their power to do so (sec. 1) extended to any case in which "it shall be necessary to impose" an assessment, irrespective of the manner of imposition. But in a parish where assessments were in use to be imposed on the real rent, the view was expressed that the Sheriff would assess upon it notwithstanding the provision in sec. 3, that heritors having a rental of under £50 should be relieved of assessment where the kirk-session had paid to the collector of the assessment the amount of the deficiency created in the total amount of the assessment by allowing the deduction of rentals of £50 or of other rentals by that amount; this provision, it was suggested, applying only to cases "where it has been resolved" to levy an assessment, and not where the Sheriff had found it necessary himself to impose, allocate, assess, and decern for expenses of building, rebuilding, &c. It may be that even such a case might have been found to be within a benevolent construction of the intendment of the Act. But the point does not seem to have arisen for decision. In any event, the difficulty cannot arise under the provisions now substituted for those of sec. 3 of the Act of 1900 by sec. 28 of the Property and Endowments Act, 1925 (*supra*, p. 108); as these apply "whenever . . . it shall be necessary . . . to impose any ecclesiastical assessment upon land and heritages in the parish, and such assessment is imposed according to the real rent thereof."

Sec. 28 (6) of Act of 1925 applies to all cases where assessment imposed for repairs.

As sec. 27 of the Act of 1925 is without prejudice to any proceedings instituted under the Act of 1868 before 1st February, 1925, or to any orders that may be pronounced therein, the powers of a Sheriff to assess in the course of such proceedings under sec. 9, &c., of the Act of 1868 are still available. And as under sec. 28 (8) of the Act of 1925 "the existing law and practice relating to . . . ecclesiastical assessments shall apply to . . . ecclesiastical assessments to be imposed under or in consequence or pursuance of this section," it would seem that where it becomes necessary for an assessment to be imposed to meet sums due under sec. 28, a Sheriff has still available all the powers hitherto possessed by him under the Act of 1868 or otherwise subject only to the modifications contained in the Act of 1925.

It is to be observed that the Ecclesiastical Buildings and Glebes Act, 1868, in effect provided a code of procedure in regard to the matters enumerated which superseded any other proceedings. For, by sec. 3, if no appeal to the Sheriff as therein provided for was taken within twenty days of the date of any order, finding, judgment, interlocutor, or decree of a Presbytery, it was declared that such order, &c., should be "final and not subject to review." And it followed from this that after that Act became operative the only means of obtaining review of any deliverance as to these matters competently pronounced by a Presbytery, even by the Lord Ordinary on the Teinds, was by means of and after following the procedure by way of appeal to a Sheriff laid down in the Act. An important consequence of this seems to be that the prohibition in the Property and Endowments Act (sec. 27) against the initiation for the future of proceedings in terms of sec. 3 of the Act of 1868, involves that the matters therein mentioned which formed the appropriate subject-

Provisions of
Act of 1868
formed a self-
contained
code.

matter of such proceedings can now be dealt with only—if at all—under the provisions of the Act of 1925. This leads to the consideration of

II. THE POSITION AS TO PROCEDURE UNDER THE CHURCH OF SCOTLAND (PROPERTY AND ENDOWMENTS) ACT, 1925.

Sec. 27 of the Act of 1925, which has thus rendered practically obsolete the procedure which had for more than half a century regulated applications relating to these matters, is in the following terms:—

Supersession
of those by
15 & 18 Geo.
V. c. 33,
sec. 27.

“ No proceedings relating to any of the matters mentioned in section three of the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868, shall be instituted or entertained before or by any presbytery or any court of law or the Commissioners except as hereinafter in this Act provided. The foregoing provision shall be deemed to have had effect as on and from the first day of February, nineteen hundred and twenty-five, but without prejudice to any proceedings instituted before that date or to the enforcement of any order, finding, judgment, interlocutor, or decree made, given, or pronounced therein, or to any contract or agreement made by heritors before that date or to any resolution passed by heritors to levy an assessment to meet expenditure incurred in pursuance of such contract or agreement, and any such assessment shall be recoverable as if this Act had not been passed.”

Consideration of this section shows that its operation goes far beyond mere procedure. For by the veto which it imposes on the institution or entertaining before or by *any Presbytery or any Court of law or*

the Commissioners of proceedings in relation to the matters mentioned *except as thereafter in the Act provided* it renders incapable of enforcement, and therefore for all practical purposes abrogates; any rights hitherto existent as to these matters, except such as there is machinery provided for rendering effective under the provisions of the Act itself. The bearing of this will best be understood by looking at the different matters to which the superseded proceedings might relate and considering how far the Act of 1925 provides for dealing with these.

This practically abrogates formerly existing obligations in regard to all matters not expressly provided in the Act of 1925.

On referring to sec. 3 of the Act of 1868 we find that the matters mentioned therein to which proceedings may relate may conveniently be classified into three groups, which may be separately considered, viz.—

Effect of Act of 1925 in the various matters mentioned in sec. 3 of Act of 1868.

- (a) Proceedings relating to the building, rebuilding, repairing, adding to, or other alteration of CHURCHES or MANSES, or to the designing or excambing of sites therefor;
- (b) The designing or excambing of GLEBES or ADDITIONS to GLEBES; and
- (c) The designing or excambing of sites for or additions to CHURCHYARDS, and the suitable maintenance thereof (including the building or repairing of churchyard walls).

As regards the first group, relating to CHURCHES and MANSES, as has already been shown fully in the chapters on these (Chapters IV., V., and VII., *ante*), the scheme of the Act provides, so far as existing parishes *quoad omnia* are concerned, for the transference of these buildings in property to the General Trustees on behalf of the church and the freeing of heritors from any liability for future upkeep, subject only to a liability on the heritors (in the absence of any agreement come to between them and the

Matters affecting churches and manses.

General Trustees) to be directed under an order by the Sheriff to carry out such repairs (if any) *not involving structural alterations*, as the Sheriff may consider necessary; or if the General Trustees shall so require to pay to them such sum of money in lieu of repair as the Sheriff may determine. In view of this, it is obvious that there is no longer room in the case of existing parishes for proceedings relating to the building, rebuilding, adding to, or other alteration of a church or manse; and that the scope of proceedings even for repairs is very narrowly limited, and that these must take the shape of an application to the Sheriff under sec. 28. (As to the form of which, see *infra*, p. 363.) Nor is there room left within the scheme of the Act in such a case for proceedings for designing or excambing a site for a church or manse. Excambion, indeed, may still be competent; but this would now be as an incident of the right of property vested under sec. 28 (3) (b) in the General Trustees, which they may carry through at their own hand as any other proprietor vested with a property title can.

It is indeed true that even among old parishes *quoad omnia* there are certain exceptional cases provided for under sec. 28 (4), in which, owing to the existence of exceptional obligations on others than the heritors, a wider and more continuing liability in respect of the fabric of the church or manse, or of the maintenance thereof, may still obtain. Whether this be so falls to be decided by the Sheriff, and, if he affirms that the case is one falling within the special provision, it will be dealt with by an order of the Ecclesiastical Commissioners created by the Act. To them, too, as has been shown, has been committed the dealing with the cases of burgh and other churches and manses to which specialties apply.

Disjunction
and erection
of new
parishes.

The disjunction and erection of a new parish *quoad omnia* was not a proceeding "relating to a matter mentioned in sec. 3" of the Act of 1868, falling as it

did within the purview of the Teind Court. And (unless prevented by the repeal in sec. 48 of the Act of "so much of any Act as is inconsistent with this Act") it is theoretically possible (though practically most unlikely) that a new parish *quoad omnia* might even yet be erected by the Court of Teinds, and, if this were done, there seems nothing to prevent the Court from designing a site for and requiring to be erected a church and manse for the parish.

Reverting to the normal case of an old *quoad omnia* parish, the general scope of the provisions in sec. 28 relating to churches and manses are fully dealt with in the chapters already referred to. It only remains here to consider the forms in which certain of the proceedings contemplated in that section, which involve judicial or *quasi*-judicial procedure, should be taken.

Forms of procedure in normal case.

An application to the Sheriff under sec. 28 (1) or (2) will appropriately be made by writ in Form A annexed to the First Schedule of the Sheriff Courts (Scotland) Act, 1907 (Sched. I., par. 1). In the case of an application under sec. 28 (1) it will run as follows:—

Form of application to Sheriff or order for repair or payment in lieu thereof.
7 Edw. VII. c. 51.

Sheriffdom of . . . at . . .

The Church of Scotland General Trustees, incorporated by the Church of Scotland (General Trustees) Order, 1921, *Pursuers*;
against

The Heritors of the Parish of . . . and A B,
Clerk to and as representing said Heritors,¹
Defenders.

The pursuers crave the Court for an order conform to the Church of Scotland (Property and Endowments) Act, 1925 (15 & 16 Geo. V. c. 33), sec. 28 (1), ordaining the defenders to carry out the following repairs (specifying

¹ Cf. *Boswell v. Duke of Portland*, 1834, 13 S. 148, and *Heritors of Bathgate*, 1908, 15 S.L.T. 646.

them [or, preferably if the repairs are extensive, the repairs specified in the specification lodged herewith] or otherwise, such repairs (if any) not involving structural alterations as the Court may consider necessary on the [Church and Manse] or [CHURCH] or [MANSE] (as the case may be) of the said parish of . . . or otherwise if the pursuers shall so require to pay to the pursuers such sum of money in lieu of such repairs as the Court may determine; and to find the pursuers entitled to the expenses of this application.²

Form of
application
for certificate
that obliga-
tions fulfilled.

An application under sec. 28 (b) will run—

The Church of Scotland General Trustees (*ut supra*), Pursuers [or A B (designation), a Heritor in the Parish of . . . Pursuer]] (*as the case may be*);

against

The Heritors of the Parish of . . . and X Y,
Clerk to and as representing the said Heritors,
Defenders [or The Church of Scotland
General Trustees (*ut supra*), *Defenders*] (*as
the case may be*).

The pursuer(s) crave(s) the Court to grant a certificate conform to the Church of Scotland (Property and Endowments) Act, 1925 (15 & 16 Geo. V. c. 33), sec. 28 (2), that all the obligations incumbent on the heritors of the said parish of . . . with respect to the [CHURCH and MANSE] or [CHURCH] or [MANSE] (*as the case may be*) of the said parish as described in the Schedule hereto have been fulfilled or satisfied and are now at an

² As to expenses, see *Church of Scotland General Trustees v. Ardnamurchan Heritors*, 1927, 44 Sh.Ct.Rep. 83; S.L.T. 1928 (Sh.Ct.) 2.

end, and that in or as nearly as may be in the form set out in the Eleventh Schedule to the said Act; [and to find the heritors of the said parish liable to the said Church of Scotland General Trustees in the expenses to be incurred by them in connection with this application, including the expense of recording the said certificate.]³

In either case there will be annexed a condescendence setting forth articulately the facts on which the application is grounded, and a note of the appropriate pleas in law. Where the application is presented by the General Trustees with consent of the heritors, or *vice versa*, this should be stated in the condescendence. And in the latter case a certificate by the Trustees admitting that all obligations have been fulfilled should be lodged in process. In these cases expenses will probably be matter of arrangement. The writ will be signed as prescribed by article 3 of the First Schedule to the Sheriff Courts Act, 1907. Applications under the Act being summary (cf. Sheriff Courts Act, 1907, sec. 3 (*p*)), the procedure will be that prescribed by sec. L of the Sheriff Courts Act, 1907. In view of the terms of sec. 28 (1) and (2) of the Property and Endowments Act, appeal from the decision of the Sheriff-Substitute disposing of the application would seem to be incompetent.^{3a}

By sec. 28 (3) of the Act of 1925, when a certificate issued by the Sheriff under sec. 28 has been recorded as aforesaid the following consequences ensue:—

- (a) any liability or obligation incumbent on any heritor in connection with the subjects to which the certificates relates shall be at an

³ As it is in the interests of all parties that a certificate should be obtained—(of the heritors as freeing them from future liability and of the Trustees as giving them a title)—it would seem reasonable that, in the absence of agreement to the contrary, or of special circumstances in which unnecessary expense has been occasioned by the conduct of one party, each party to this application should bear their own expenses.

^{3a} Cf. Wallace, "Sheriff Court Practice," p. 403.

end except the obligation or liability to assess or to be assessed for the repayment of any debt existing at the date of the certificate; and

- (b) all rights of property in the said subjects shall by virtue of this Act and without the necessity of any further conveyance vest in and belong to the General Trustees, to the same effect as if a complete feudal title holding of the Crown in free blench farm for payment of a penny Scots yearly if asked only had been duly constituted in favour of the General Trustees.

In practice it has been found convenient to define the subjects described in the Schedule by reference to a plan mentioned therein and signed as relative thereto, of which a docquetted duplicate can be sent in to the Register as provided by sec. 48 of the Conveyancing (Scotland) Act, 1924.

Special cases where obligations of maintenance rests upon or is shared by parties other than heritors.

In the exceptional cases in which the ordinary obligations of the heritors in regard to the ecclesiastical buildings of a parish are either shared by or are entirely incumbent on other persons or bodies, the provisions made by sec. 28 (4) and (5) for removal, on application to the Sheriff, of the cognisance of the case to the Commissioners apply to both church and manse, and they have already been explained in Chapters IV. and VII., to which it is sufficient here to refer. In form the application will follow that prescribed in the Sheriff Courts Act, 1907, as above explained, save that the crave will be that the Court should—

“ find and declare that the case of the [*church and manse*] or [CHURCH] or [MANSE] (*as the case may be*) of the parish of . . . ought to be dealt with by the Scottish Ecclesiastical Commissioners appointed under the Church of Scotland (Property and Endow-

ments) Act, 1925 (15 & 16 Geo. V. c. 33),
in terms of sec. 25 (4) of that Act.

Any conclusion for expenses should in this case ask expenses only against parties who may appear and oppose.

If the Sheriff so find and declare, the matter will then fall to be dealt with under a scheme and relative order to be issued by the Ecclesiastical Commissioners under the Act (sec. 21 (1) (e)). The cases of churches and manse of the scheduled Burgh, Parliamentary, and Highland charges fall to be dealt with by the Commissioners automatically under the provisions of the Act itself. (See sec. 21, and Schedules VIII., IX., and X.) The formal procedure in regard to the application for or issue of such schemes is not defined in the Act, the Commissioners having themselves full power to regulate it. No regulations have so far been issued. It is understood, however, that the practice of the Commissioners has varied in regard to the preparation of schemes. They have in one or two cases themselves framed and issued the scheme in draft with an order on those interested to lodge objections to it; but more frequently they have issued an order on one or other of the parties interested to lodge a draft of the scheme proposed by such party, the other or others concerned being given an opportunity of lodging answers. The selection of the party on whom the duty of preparation is laid is presumably dictated by the consideration of which of those concerned is in the particular case most likely to be possessed of full information on the matters involved. The schemes hitherto submitted have generally contained a preamble setting out the pertinent circumstances which render the scheme necessary or appropriate, and proceed to set out the particular provisions which are suggested for enactment. An opportunity is given for oral hearing by the Commissioners when desired; and

Matters falling to be dealt with under orders or schemes of the Scottish Ecclesiastical Commissioners.

Procedure.

the Commissioners have full powers to take evidence or make such inquiry as they may think proper. In at least one case the Commissioners have received a representation from and have heard a party who had not been formally given an opportunity of lodging objections to a scheme. The framing of such Order as may be necessary to give effect to a scheme is a matter for the Commissioners themselves.

Procedure in
matters
affecting
glebes.

As regards the SECOND group of subjects above enumerated (*ante*, p. 361), viz., the designing or excambing of GLEBES or additions to glebes, no provision is made under the Act for excambing a glebe, the reason obviously being that this is for the future removed from the sphere of judicial procedure owing to the transfer to and vesting in the General Trustees of the *ownership* of glebes under sec. 30 (3) (b). The Trustees as owners may deal by way of ordinary contract with any excambion which seems to them desirable. Under the Act, however, it seems that a glebe may still fall to be designed or enlarged. For, by sec. 30 (1), it is part of the duty of the clerk of each Presbytery to intimate to the Commissioners if it is claimed that the heritors concerned have not fully implemented the obligations incumbent on them according to the existing law and practice with respect to *the provision and enlargement of a glebe*. And by sec. 30 (3) the orders appointed to be issued by the Commissioners with respect to glebes must make provision for, *inter alia* “ (a) the implement by the heritors of any obligations incumbent on them as aforesaid which have not already been implemented.” The machinery for securing implement being thus through the medium of an Order by the Commissioners, the position as to procedure is similar to that considered above in dealing with the cases affecting churches and manse falling to be disposed of by the Commissioners.

Finally, as regards the THIRD group of matters mentioned in sec. 3 of the Act of 1868, viz., the designation or excamping of sites for or additions to CHURCHYARDS, and the suitable maintenance thereof (including the building or repairing of churchyard walls), the provisions of the Act of 1925 have rendered obsolete proceedings in regard to these matters, or at least have removed them outwith the sphere of parochial ecclesiastical law. For, by sec. 32, the PROPERTY IN ANY CHURCHYARD heretofore held by the heritors of any parish is, as and from the passing of the Act, by virtue of the Act, transferred to the parish council, which is also charged in place of the heritors with the power or duty of enlarging or extending the churchyard and of assessing for the cost thereof. The substantive results of these provisions are fully explained in the chapter on "CHURCHYARDS," Chapter VI., *ante*; and there are no questions of procedure involved which call for treatment here.

Matters
affecting
churchyards.

Procedure in proceedings under the Act of 1925 for augmentations under sec. 10 and Schedule 4, and for the preparation, issuing, adjustment, and custody of teinds rolls under sec. 11 is regulated by two procedure Acts of Sederunt—the former by that of 17th July, 1925 (printed with later amendments in Appendix III., pp. 602 *et seq.*), and the latter by that of 28th October, 1925 (printed in Appendix III., at pp. 613 *et seq.*). The provisions of these Acts of Sederunt are minute and detailed, and do not lend themselves to useful condensation in a short summary. Those engaged in carrying through such proceedings should do so with constant reference to the directions in the Acts of Sederunt. Appended to these Acts are forms of summons and petition for initiating the respective proceedings.

PART III.

CHAPTER X.

THE MINISTER—NOTARIAL POWERS— STIPEND—ANN—COMMUNION ELEMENTS—PATRONAGE.

A PARISH MINISTER is a public officer appointed by the Church of Scotland, under her inherent authority recognised by the State, to the spiritual charge of a particular district of land, to the service of God in the church of his district, and the administration of the ordinances approved by the Church of Scotland. His office is recognised by the State as a *munus publicum*. The office of principal in a missionary institution connected with the Church is not, however, a *munus publicum* (*Hastie v. M'Murtrie*, 1889, 16 R. 715).

Nature of the office of a parish minister.

The endowment of a parish minister consists at common law of the TEMPORALITY of benefices—*i.e.*, the manse, glebe, and minister's grass—and the SPIRITUALITY of the benefice—*i.e.*, the stipend (*Craig*, "*Jus Feudale*," 1 dieg. 14, secs. 1, 2; *Ersk.* ii. 10, 4; *Bank.* ii. 8, 127; *D.* 373).

Twofold nature of the endowment.

His right to the temporality emerges with his admission to the benefice; his right to the spirituality is subject to the claims of a deceased minister's next-of-kin. The term "induction" is frequently used to describe the entrance of a minister upon his cure. But in *Hastie v. M'Murtrie* (*supra*) Lord President Inglis observed—"Induction is not a *nomen juris*, neither is it a *vox signata*, in the existing ecclesiastical law of Scotland. By the canon law, which was the ecclesiastical law of Scotland prior to the Reformation, induc-

Emergence of the minister's right to enjoyment of the temporality and spirituality respectively.

"INDUCTION" not *nomen juris* or *vox signata*.

tion was the legal name of a ceremony by which, after collation by the bishop of the diocese, some inferior ecclesiastical person gave the presentee actual and corporeal possession of the church and benefice, under mandate from the bishop, by the use of certain symbols, which it is needless to enumerate. The ceremony was formal and imposing, and necessary to complete the presentee's title to the benefice. During the two comparatively short periods in the seventeenth century, when the National Protestant Church of Scotland was governed by bishops, induction had again a fixed and technical meaning, and was the name for a somewhat similar ceremonial conducted under the authority of the bishop, which consisted in the inferior clergy of the diocese, after collation by the bishop, carrying the collated presentee into the church and placing him in the pulpit, or in some other conspicuous part of the church, and there delivering to him the keys of the church. But with the ceremony the name of induction as a *nomen juris* has perished. There is no use of the name in any of the numerous statutes relating to the settlement of ministers under Presbyterian Church government. In the earliest of these statutes (1567, c. 7) it is provided 'that the examination and admission of ministers be only in the power of the Kirk.' By the Act of 1592, c. 8 [114], Presbyteries are 'bound and astricted to receive and admitt quhatsumever qualified minister presented,' &c. The Act of 1690 simply revived the Act of 1592. By the Act 10 Anne, c. 12, restoring patronage, the Presbytery is 'bound to receive and admit such qualified person or persons, ministers or minister, as shall be presented.' The Aberdeen Act, 1843 (6 & 7 Vict. c. 61), bears in its title to be an Act respecting the ADMISSION of ministers, and by sec. 3 Presbyteries are directed to 'admit and receive into the benefice.' Lastly, in the Act 37 & 38 Vict. c. 82, abolishing patronage, and giving the appointment of ministers to congregations, it is enacted (sec. 3) that 'the courts of the Church are

Alexander's
Abridgement, p. 44.

Ibid., p. 105.

hereby declared to have the right to decide finally and conclusively upon the APPOINTMENT, ADMISSION, AND SETTLEMENT in any church and parish of any person as minister thereof.' As to the form of admission to the benefice, the Church courts are left at perfect liberty to exercise their own discretion. But it is clear they could not use, and never have used, the old ceremonial of induction." "It may be true," the Lord President continued, "that the old name of the ceremony of INDUCTION still lingers in the common speech of the country, and may be used popularly even in the proceedings of Church courts as an equivalent of 'ADMISSION TO A BENEFICE.' It is remarkable, however, that in the earlier authoritative or *quasi*-authoritative Church documents, as distinguished from Acts of Parliament, the term 'INDUCTION' entirely disappeared. In the First and Second Books of Discipline, in Pardovan's 'Collections,' in Principal Hill's 'View of the Constitution of the Church of Scotland,' 'ADMISSION OF MINISTERS' and not 'INDUCTION' is the phrase used. But what is the act of admitting a minister to a benefice, and what is its effect? There is no *actus sollemnis* apart from ordination. By the imposition of the hands of the Presbytery, the candidate is admitted and set apart to the office of the holy ministry. If he has been already ordained, the fact is minuted. What follows is not a ceremony at all, but merely A RECOGNITION OF THE NEW MINISTER AS A MEMBER OF PRESBYTERY IN HIS CAPACITY OF MINISTER OF THE BENEFICE TO WHICH HE HAS BEEN PRESENTED OR ELECTED."¹

¹ "Institution was formerly given by the presiding Presbyter delivering to the newly ordained pastor the pulpit Bible, and by putting into his hands the key of the church and the bell-strings. This was done at the close of the service, as appears, for example, from the following extract from the Records of the Presbytery of Perth in 1700: 'The moderator having closed the action with prayer and praise, gave the said Mr. C. INSTITUTION by delivering him the kirk Bible, key of the kirk doors, and bell-strings; whereupon Mr. C. for his part, and J. B., elder, in name of the rest of the elders and parishioners, asked and took instruments in the clerk's hands'" (Sprott, "Worship and Offices of the Church of Scotland" (1882), p. 215).

Recent statutory provisions consistent with this.

The most recent statutory provisions as to rights dependent on the entry of a minister to enjoyment of the benefice are consistent with the view here expressed. Under sec. 4 of the Property and Endowments Act, 1925, the rights of an assistant and successor in regard to election to standardised stipend depend not on "INDUCTION," but on whether he has at the passing of the Act been APPOINTED (*infra*, pp. 420, &c.). And in the latest piece of legislation, the Church of Scotland Ministers and Scottish University Professors' Widows' Fund (Amendment) Order Confirmation Act, 1926, the expression used in sec. 3 is "minister . . . ADMITTED to his benefice."

Minister's right to complete enjoyment of the benefice is absolute, subject only to performance of duty to serve the cure.

The minister's enjoyment of the benefices in both classes is in its nature absolute, qualified only by the condition of dutifully serving the cure to which the benefices are attached, or, in other words, of ministering to the needs of his parish and of the members of his congregation, whether they reside in his parish or not. "There was a time," said Lord President Inglis, "when parishioners were compelled to attend their Parish Church, but these were the days of intolerance and persecution, and have long ago disappeared. Congregations now consist partly of parishioners and partly of persons resident beyond the bounds of the parish; these persons are all equally entitled to the services of the minister" (*Charlton v. Corke*, 1890, 17 R., at p. 788). He should, whether minister of a country or town parish, reside in it. To this rule there can seldom be any justifiable exception. Though he lets his manse, he ought to continue to reside in the parish. In the *Inland Revenue v. Fry*, 1895, 22 R. 422, Lord President Robertson observed that one of the checks upon the minister's right to let the manse was "his duty to be present to serve the cure, a duty enforceable by the ecclesiastical superiors. But then this duty may be performed without living in the manse, for a minister might have, or might choose, another residence *within the parish*." Lord Adam said—"So long as the minister *resides in the parish*,

Minister's duty of residence within parish.

and gives no cause of complaint as to the way in which he performs his ministerial functions, the Presbytery have no right to say to him, ' You shall not let the manse.' "

In this connection it is, however, proper to keep in view the right recognised by the Church of Scotland Act, 1921, as inherent in the Church " to legislate and to adjudicate finally in all matters of doctrine, worship, government and discipline in the Church." This, coupled with the fact that the property of manse is for the future to be vested in the General Trustees of the Church, would seem to place the General Assembly in a position to prescribe, at least to new incumbents, such conditions in regard to letting and other matters as it may think proper.

Possibility of restraint on letting of a manse under powers now recognised as vested in the Church.

A minister of a city parish has no manse, but his parishioners' right to immediate and convenient access to their minister is not less than that of country parishioners.

Case of city minister as regards residence.

Resignation, deposition, or translation may terminate the tenure of office, and consequently of the benefice, as well as death; the minister is thus not, even strictly, a liferenter. But he may be enrolled on the valuation roll as such in respect of his manse and glebe.

Termination of office.

It is the duty of the minister to preserve his benefices for his successors in the cure; and even his cession of any of his rights enjoyed as minister will not affect those who come after him. The minister of Falkland, *e.g.*, gave up, with concurrence of the Presbytery, his manse and glebe (in 1650) for an annual payment; but in 1793 the court found one of the ministers of Falkland entitled to a manse and glebe (*Minister of Falkland v. Johnston*, 1793, Mor. 5155; see also *Panmure v. Presbytery of Brechin* (Brechin), 1855, 18 D. 197). To this rule there is, however, at least one exception: where the minister has accepted £20 Scots, in place of " minister's grass," the bargain cannot afterwards be recalled (*Minister of Dollar v. Duke of Argyll*, Dollar case, 1807, Mor., Glebe, App. 7).

Successors not ordinarily subject to be prejudiced by a minister's dealings with benefice.

Falkland and Brechin cases.

INCOME TAX
deductions
claimable by
minister.

8 & 9 Geo. V.
c. 40.

A minister is entitled under the general rules applicable to Schedules A, B, C, D, and E of the Income Tax Act, 1918 (rule 2), to a deduction in assessing the income tax chargeable in respect of any profits, fees, or emoluments of his office of—

- (a) any sums of money or expenses incurred by him wholly or exclusively and necessarily in the performance of his duty as a clergyman or minister;
- (b) such part of the rent (not exceeding one-eighth) as the commissioners by whom the assessment is made may allow, paid by him in respect of a dwelling-house any part of which is used mainly and substantially for the purposes of his duty as such clergyman or minister;

and where such clergyman or minister is in the occupation of a dwelling-house, but pays no rent therefor, he shall for the purposes of this provision be deemed to pay a rent equal to the annual value of the dwelling-house as assessed to tax under Schedule A of the Act.

Position as to
inclusion of
value of
manse in
estimating
income for
abatement or
allowance
claims.

The minister of an old parish must, in estimating his income for the purpose of ascertaining any allowance or abatement to which he may be entitled under the law for the time being applicable, compute the annual value of his manse as earned income, subject to the deduction above mentioned, seeing that he is entitled to make it a source of income if he likes to do so (*Inland Revenue v. Fry* (Girvan), 1895, 22 R. 422). It may be otherwise in the case of a manse provided for the minister of a *quoad sacra* parish if under the terms of the trust under which it is held the minister is prevented from turning it into a source of income by letting it. In such a case the Schedule A tax is payable; but the value of the manse probably need not be reckoned as part of the income of the minister for the purpose of abatement. It may, however, be to the advantage of the minister that it should be so reckoned

where the income is small. And under the existing statutes an option is given to the minister to intimate to the inspector of taxes in each year not later than 30th September his election to have the annual value of the house (less ground burdens and any interest of bonds) charged as part of his taxable income. If the option be exercised, the result may be that the tax rate payable may be less than the full rate for the year. If the option be not exercised, the full rate will fall to be paid under Schedule A by the trustees in whom the property is vested, and no repayment can be obtained. It is thus a question of circumstances in each case which course is most expedient.² (Cf. *infra*, pp. 410-411.)

No minister can hold a plurality of benefices (Act 1584, c. 5 [132]; but a cure consisting of parishes united in one parish does not constitute plurality. This is again, however, a matter within the competence of the church itself to regulate, under the powers recognised as belonging to it, under the Act of 1921.

Plurality of benefices forbidden. Abridgement, p. 77.

THIRTEEN years' uninterrupted peaceable possession of a subject by an incumbent as his benefice, or a part of it, supports a presumptive right in his favour to continuance of possession without a written title. This is the rule of *decennalis et triennalis possessio*, as recognised by the law of Scotland. (The definition in the text is that of Duncan, p. 737. See Stair, ii. 1, 25; Bank. ii. 8, 106 *et seq.*; Ersk. Inst. iii. 7, 33, 34.) The case-law is chiefly old, but see *Cochrane v. Smith* (Cupar), 1859, 22 D. 252, in which the modified canon rule is recognised as adopted into Scots law. (Cf. also *Selkirk Presbytery v. Duke of Buccleuch* (Yarrow), 1869, 8 M. 121.) In the case of *Traill v. Dangerfield* (Lady Parish), 1870, 8 M. 579, it was held that a parish precentor was not an ecclesiastic entitled to plead this *possessio* in claiming from a purchaser of an estate a payment in use to be made to him and

Decennalis et triennalis possessio.
Cupar case.

² See Burn's "Income Tax Guide," 5th edn., pp. 90-91 and 96-101 as to this, and also as to expenses legitimately deductible, pp. 99-101.

his predecessors by the previous proprietors for more than one hundred years.

SEPTENNIAL
prescription.

SEVEN years' possession by a minister also enables him without a title to retain, *qua* ecclesiastic, possession of a subject. A judgment following on such possession is regarded (*Cochrane v. Smith, supra*) as in nature and effect MERELY POSSESSORY; whereas, in the case of thirteen years' possession, the judgment amounts to a decerniture that the subject so possessed BELONGS TO AND FORMS PART OF the benefice, and to this effect operates as a written title of property in the subject.

Other longer
prescriptions.

As to prescriptive title by THIRTY years' possession *in ecclesiasticis*, see Act of Sederunt, Dec. 16, 1612; *Marshall v. Drumkilbo*, 1629, 1 Br.Supp. 62, 378; and by forty years' possession, see Act 1617, c. 12; Ersk. iii. 7, 3-5; *Crawfurd v. Maxwell* (Stoniekirk), 1724, Mor. 10,819.

NOTARIAL POWERS.

Historic
origin of
notarial
function.

The power to act AS A NOTARY PUBLIC is inherent in the office of parish minister, and is the last vestige of the ancient connection between the Church and the law in Scotland. Historically, there were three classes of notaries—IMPERIAL NOTARIES acting under the authority of the Emperor, head of the Holy Roman Empire, who were laymen; APOSTOLIC NOTARIES appointed by the Pope—generally, if not invariably, ecclesiastics—authorised to exercise notarial functions in temporal as well as spiritual affairs, and a third class whom the growing power of the apostolic notaries led King James III. to create, with the intention of curbing ecclesiastical pretensions to a monopoly of legal business, viz., ROYAL NOTARIES. The attempt was only partially successful, as the Popes continued to make apostolic notaries, and the Church gave them a preference over imperial and royal notaries. The Act 1563, c. 79 (in Alexander's abridgement at p. 41 as cap. 17), however, vested the power of admitting notaries in the Court of Session alone. But where the

apostolic notaries end, the parish ministers as notaries begin. There seems little doubt that, in all his actings as a notary public in virtue of his office as parish minister, the clergyman is a survival of the apostolic notary. The Scots Parliament in its zeal thought to extinguish utterly the authority of any one to act as notary who did not derive his title from the Court of Session; and yet no sooner was this done than the parish minister stepped forward, Presbyterian though he was, to fulfil the useful functions of the old clergy. Thus the Act c. 133 (in Alexander's abridgement at p. 79 as cap. 6) of James VI., 1584, provides that none who are ministers, either at the date of the passing of the Act or thereafter, "sall in ony waies accept, use, or admistrat ony place of judicature, in quhatsumever civil or criminal causes, nocht to be of the Colledge of Justice, commissioners, advocates, court clerkes, or notaris in ony matters (THE MAKING OF TESTAMENTES ONELY EXCEPTED), under the paine of deprivation fra their benefices, livinges, and function."

It is curious that from the time when John Knox John Knox as notary. ceased to attend classes in the University of Glasgow, then a city of only 2000 inhabitants, he passes completely out of sight down to 1545, but for the fact that he four times exercised notarial functions as a cleric. In the Protocol book of Alexander Symson, Elder, " ' Sir Jhohn Knox ' is represented as appearing at the market-cross of Haddington, 13th December, 1540, on behalf of James Ker of Samuelston. He appears as ' Sir Jo. Knox ' in a case before the Burgh Court of Haddington, 21st November, 1542. A third document is a notarial instrument, drafted by Knox himself, dated 27th March, 1543, and bearing the signature ' Joannes Knox sacri altaris minister Sanctiandree dioceseos auctoritate appostolica notarius.' " In the fourth document Knox is named as a witness.³

³ Hume Brown, "Life of Knox," 1895, i., p. 58—"Either James Beaton, who held the see of St. Andrews from 1522 till 1539, or David

Statutory
basis of
notarial
function in
the attesta-
tion of wills.

The consuetudinary right of a parish minister to act as a notary in the particular matter of aiding in the execution of wills—a right which probably originated in a recognition of the privilege attaching to his high calling of assisting the feeble in case of necessity—has been confirmed, and its limits and the conditions of its exercise may wisely be regarded as defined by sec. 18 of the Conveyancing (Scotland) Act, 1924. The terms of this section are as follows:—

Conveyancing
(Scotland)
Act, 1924 (14
& 15 Geo. V.
cap. 27), sec.
18.

“NOTARIAL EXECUTION.—(1) Any deed, instrument, or writing, granted after the commencement of this Act” (1st January, 1925), “whether relating to land or not, may, after having been read over to the granter, be validly executed on behalf of such granter, if he from any cause, permanent or temporary, is blind or unable to write, by a law agent or a notary public, or a justice of the peace, OR AS REGARDS WILLS OR OTHER TESTAMENTARY WRITINGS, BY A PARISH MINISTER ACTING IN HIS OWN PARISH, OR HIS ASSISTANT OR SUCCESSOR SO ACTING, subscribing the same in the presence of the granter and by his authority—all before two witnesses who have heard such deed, instrument, or writing read over to the granter, and heard or seen such authority given, and a holograph document in the form of Schedule I. hereto, or in any words to the like effect, shall precede the signature of such law agent or notary public or justice of the peace or parish minister, or his assistant or successor.”

“(2) For the purpose of section 39 of the Conveyancing (Scotland) Act, 1874, a deed executed on behalf of the granter or maker thereof in accordance with sub-section (1) hereof shall be a deed subscribed by such granter or maker.” (*I.e.*, it shall not be deemed invalid or denied effect according to its legal

Beaton who succeeded him must have been the bishop under whom he held his office of notary. The important inference to be drawn from Knox's tenure of this office,” says Mr. Brown, “is that Knox was presumably of good repute in the Church till the day when he left it.”

import because of any informality of execution, but the burden of proving that the deed, &c., so executed was subscribed by (*i.e.*, for present purposes, by authority of) the granter or maker thereof, and by the witnesses by whom it bears to be attested, shall lie on the party using or upholding the same. Such proof may be led in the manner provided in sec. 39 of the Act of 1874.)

In regard to these provisions for the exercise by a parish minister of notarial functions, the following are the salient points to be kept in view:—

Material points to be kept in view by parish minister acting as notary.

(A) *The class of deeds in regard to the execution of which he may act*—WILLS OR OTHER TESTAMENTARY WRITINGS. Under the latter heading may fall a deed which, though not in form a will, is essentially testamentary in its nature, *e.g.* (it is thought), the execution of a power of appointment over the estate of a third party which may competently be executed by testament. Although the function of a minister as a notary has always been regarded as properly restricted to the execution of testaments, yet in an old case in which a minister had acted as notary in the execution of a contract of marriage, the Court of Session on 12th July, 1631, refused to find the contract null on that account; “for albeit the Act (1584) prohibits ministers to be notaries, yet such acts are not declared null, done by them, but ordains another pain, viz., deprivation of them; so that the prohibition, having a pain specially (directed) thereto, is not a simple prohibition, which ought to derogate to the fact itself.” Having regard to the terms of sec. 18 of the Act of 1924, *supra*, it is doubtful if this decision would now be followed if occasion arose. In any case, parish ministers should confine themselves strictly to wills or testamentary writings for the execution of which they have statutory authority.

(B) *The ministers who may so act*—“A PARISH MINISTER acting in his own parish, or his assistant

Capacity of
minister of
quoad sacra
parish to act
as notary.

7 & 8 Vict.
c. 44.

Minister of
Parliament-
ary Highland
parish.

Extent of
right of
minister of
"Gaelic
parish" under
the Parishes
Act, 1844, to
act as notary.

OR SUCCESSOR SO ACTING." This clearly excludes a minister from acting in another parish than his own, even for a parishioner of his own. Notwithstanding doubts formerly expressed as to whether the minister of a parish *quoad sacra* might competently act as notary in the execution of a will in the territory annexed to his parish, it is thought that he is covered by the terms of sec. 18 quoted. So far as his ecclesiastical status is concerned, the minister of a parish *quoad sacra* is as fully vested in clerical functions as is any other parish minister. Under sec. 8 of the New Parishes Act, 1844, he enjoys "the status, and all the powers, rights, and privileges of a parish minister" of the Church of Scotland. (Cf. *Bell v. Bell*, 1840, 3 D. 204; *Grant v. M'Intyre*, 1849, 11 D. 1370; *Murrie v. M'Donald*, 1853, 16 D. 325—which practically overrules *Bell v. Bell*; and *Hutton and Others v. Harper and Others* (Cambusnethan), 1876, 3 R. (H.L.) 9.) Although in the latter case the ministerial function involved was the proclamation of banns, the reasoning on which the judgments were based depended upon a construction of the Act of 1844, which supports the view here taken.

In the case of churches in the Highlands erected under 5 Geo. IV. c. 90, the minister admitted is by sec. 15 "entitled and bound to discharge within the district for the behoof of which the said place of worship shall have been erected or provided all the duties of a minister of the Church of Scotland, save and except the right and duty of church discipline." He would, therefore, properly act as notary in the case of of a will executed within the district. In the case, however, of a Gaelic parish erected under secs. 12 and 13 of the New Parishes Act, 1844, to which no territorial district is exclusively attached, while the minister enjoys the status and all the powers, rights, and privileges of a parish minister of the Church of Scotland (sec. 13), nothing in the section is to be construed as giving to him the right to exercise *pastoral*

superintendence or discipline over persons who are not either members of such Gaelic congregation, or of the families of members, or resident within the territorial district which may be assigned to such parish exclusively. In the case even of those who are members but who are not resident within a district so assigned exclusively, it would seem to be the prudent course, if notarial execution of a will by a minister should be required, that this should be done by the minister of the civil or *quoad sacra* parish within the bounds of which the act is done.

In the 1899 edition of Bell's Principles the opinion was expressed (sec. 2232) that, in the absence of the minister of the parish, the minister of another parish could perhaps competently act as notary; but the express terms of sec. 18 of the Act of 1924 seem to preclude this. Of course, in a case of absolute emergency, where no one else is available, it would be wise for any parish minister at hand to take the risk of acting *quantum valeat*, on the chance of the execution being sustained.

Can minister of another parish act in absence of parish minister?

The minister of a dissenting church is not entitled to act as a notary even for the limited purpose under consideration.

Minister of dissenting church cannot act.

(C) *The person on behalf of whom such will or other testamentary writing may lawfully be so executed*—ANY GRANTEE WHO IS BLIND or UNABLE TO WRITE. If he satisfies these conditions, it matters not what is the cause of the blindness or inability to write—so long, of course, as it is a cause consistent with his possession for the time being of testamentary capacity—nor does it matter whether the cause be permanent or temporary. The language of the section dispels any doubt of the competency of so executing the will of a blind person, even though he be not unable to write.

Will may be executed for person blind or unable to write.

(D) *Conditions precedent to execution*—(a) the deed must have been PREVIOUSLY READ OVER TO THE GRANTEE

IN THE PRESENCE OF TWO WITNESSES, and (b) AUTHORITY to sign must have been given to the minister by the granter IN PRESENCE OF THE WITNESSES.

Execution for deaf and dumb person unable to write.

As regards condition (a), it has been asked, what is to be done in the case of a person who is deaf and dumb? and it is thought that, to such a person, the document should be read off according to the deaf and dumb alphabet, the precaution being first taken to make sure that the witnesses understand the signs. When the truster is blind and almost totally deaf, and has heritable and moveable estate, many agents take the precaution to have two notaries and four witnesses, and perhaps this is discreet; but a parish minister cannot fetch in another parish minister, though the parish minister and a notary would probably suffice.

How authority should be given.

As regards condition (b), the authority to sign may be given by word or sign, but must at all events be clear. The 41st section of the Conveyancing Act, 1874, abolished the necessity for the granter touching the notary's pen, but to the present day it is very often touched. And the Act of 1924 recognises the competency of this mode of giving authority, by requiring, as it does in sec. 18, that the witnesses shall have HEARD OR SEEN the authority given.

(E) *Actual formalities of execution.*—These are the following:—

(a) THE MINISTER MUST SUBSCRIBE the will or other testamentary writing IN THE PRESENCE OF THE GRANTER, and BY HIS AUTHORITY ALL BEFORE TWO WITNESSES, in the manner explained in the note to Schedule I. of the Act. (See *infra*.) It must be remembered that a minister acting as notary is no more privileged to disregard formalities than is any other notary; and he must accordingly be careful to see that all the solemnities are observed. He must either personally know the granter, or be well assured of his identity.

And he must see that two witnesses, male or female, of competent age, are present.

(b) THE WITNESSES, who have HEARD THE DEED READ OVER to the granter—and who have SEEN OR HEARD the authority to sign given—(facts of which the minister should satisfy himself)—should sign the deed as attesting witnesses in the manner explained in the note to the schedule. (See *infra*.)

(c) A HOLOGRAPH DOCQUET in the form of Schedule I. to the Act of 1924, or in any words to the like effect, should PRECEDE THE SIGNATURE of the minister.

Schedule I., in the form relevant to the case of execution by a parish minister, or his assistant or successor, is as follows:—

“ Read over to, and signed by me for, and by authority of the above-named A B (without designation), who declares that he is blind (*or is unable to write*), all in his presence, and in presence of the witness hereto subscribing.

“ G H, minister (or assistant and successor to the minister) of the parish of . . .

“ M N, witness.

“ P O, witness.”

Appended to the schedule is the following:—

“ *Note.*—The above docquet shall be written on the last page of the deed, instrument, or writing, and shall be signed by the law agent or notary public, or other person authorised to sign the same, in the manner indicated in the form, and such law agent, notary public, or other person shall not require also to sign above the docquet at the end of such deed, instrument, or writing, and the prior pages thereof (if any) shall be authenticated in the usual manner by such law agent or notary public, or

other person, adhibiting his own signature thereto. The witnesses to the signatures of such law agent or notary public or other person shall subscribe as indicated in the form, and may be designed in the testing clause of such deed, instrument, or writing; but if there be no testing clause thereto, the designations of the witnesses may be added after their respective signatures, and, if desired, a specification of the date and place of signing may be added to the docquet."

Docquet
should pre-
cede authen-
tication
signature.

It will be observed that the direction in sec. 18 is that the docquet (which must be holograph) shall PRECEDE the authenticating signature. This direction ensures completion of the docquet at the time of execution, and obviates the risk to which its permissive insertion below the signature might have led, of the completion of the authentication being neglected at the time and possibly overlooked until too late.

Minister
must not take
benefit under
will authenti-
cated by him.

In no case should a minister act notarially in the execution of any will under which he takes a benefit or is appointed to act as trustee or executor; execution by him would in such a case be absolutely invalid (*Ferrie*, 1863, 1 M. 291; *Chisholm*, 1903, 11 S.L.T. 416).

While under sec. 18 (2) of the Act of 1924, a deed executed notarially under the Act is accounted to be a deed "subscribed by the granter" to the effect of bringing it within the provisions of sec. 39 of the Conveyancing Act, 1874, as to curing informalities of execution, this does not render it the less important that a minister executing a will notarially should carefully attend to giving exact compliance with the formalities prescribed by sec. 18 (1). For it is only to a deed executed on behalf of the granter or maker thereof "in accordance with sub-sec. (1) hereof" that the terms of sub-sec. (2) apply.

In particular, it is vital that the attestations both of the minister as notary and of the witnesses should be completed at the time of execution. It is true that in the old case of *Traill v. Traill*, 1805, Mor. 15, 955, the Court allowed a minister to annex an attestation as a notary, of his having subscribed the testament, and that having been done they sustained the deed. But the case of *Campbell v. Purdie*, 1895, 22 R. 443, puts the modern state of the law in a clear light. A testatrix who was unable to write was, in March, 1893, attended by two law clerks and a justice of the peace. One of the law clerks wrote the docquet, and it was signed by the justice of the peace in presence of the testatrix. The lady died in September, 1893, and the next-of-kin raised an action in March, 1894, for reduction of the testament on the ground that, as the docquet was not holograph of the justice of the peace, the settlement was invalid and of no effect in law, and that the defect in the notarial execution founded upon being an omission of an essential solemnity, and not a mere formality of execution, could not then be cured. The defender stated—"Both the deceased and the said justice of the peace were under the belief that the whole legal solemnities necessary for the legal execution of the said deed had been complied with. There is ample space between the body of the said deed and the notarial docquet and subscription of the justice of the peace and witnesses for the insertion of a docquet holograph of the said justice of the peace. The said justice is prepared to insert in said space a holograph docquet." The First Division held that the will was not validly executed, and that the defect could not be cured. The rectification was urged on the authority of *Traill's* case; Lord Kinnear said, "I agree that this" (*i.e.*, rectification) "is quite inadmissible, both because it is against the express terms of the Act of 1874, which says that the granter of the deed must be present, and

Attestations must be completed at time of execution.

also on the more general ground that a will cannot be executed after the death of the testator."

As regards the latter ground, cf. also *Walker v. Whitwell*, 1916 S.C. (H.L.) 75, in which it was held by the House of Lords that a will could not be set up where an attesting witness adhibited subscription after the granter's death. In this case the principles and precedents applicable were fully considered and discussed.

PREPARATION OF WILL BY A MINISTER.

Minister
assisting in
preparation
of a will.

Apparently somewhat analogous to, but really essentially distinct from, the function of EXECUTING A WILL NOTARIALLY, which has just been considered, is another duty which ministers (especially those of isolated parishes) are not infrequently asked to discharge, viz., THE DRAWING UP OF A WILL to give effect to the testamentary wishes of a parishioner or other person who is unable himself to frame it, and who from one cause or another is not in a position to obtain skilled legal advice. This duty, like that already considered, has its origin in the call inherent in the ministerial office to assist the poor and destitute and the feeble in case of need. But it must be borne in view that in this particular matter a parish minister, while he may have a moral duty, has as parish minister no legal privilege over any other competent person. The mere putting on paper of the wishes of a testator, in a suitable written form, to be duly executed by or for him, is a thing which may competently be done by any one. And the only specialty attaching to the position of a parish minister is that from his office, and from his reputation as a man of education and intelligence, he is perhaps liable to be asked more frequently than another to do this service.

Minister
should not
act if legal
adviser is
available.

The duty is a responsible one, not to be undertaken lightly. And wherever the circumstances reasonably permit of the services of a trained lawyer being obtained, a minister would be well advised to

urge (at least in any case where the estate is considerable or the proposed dispositions are complicated) that these services should be taken advantage of. But cases must inevitably occur where sudden and serious illness, remoteness from a town, poverty, or some other cause requires a person *in extremis*, if he is not to die intestate, to make his will, or get it made without a lawyer's guidance. And in these it is, of course, right and proper that the parish minister (or, for that part, any other minister) should, if asked, give what aid he can. That he may be fitted to do so he should familiarise himself with what is necessary for the task. It is to be observed that in this duty—differing from that of notarial execution—a minister is not restricted to acting in his own parish, nor for his own parishioners; indeed, in substance the subject-matter of this section is applicable to all ministers of religion, whether of the national church or not.

In regard to framing a will, it is important to keep in view the following points:—

Material points in framing a will.

The first necessity of a will is the use of clear and unambiguous words; the danger in a clergyman's will-making arises from his too wide vocabulary, and his acquaintance with legal terms of a kind. In his zeal to be exact, and formal, and businesslike, a minister sometimes produces a document which is inexact, informal, and unbusinesslike, even when he is dealing with less serious things than the apportionment of a dying parishioner's worldly means and estate. THE SINGULARITY OF LANGUAGE.

FIRST DUTY OF ONE WHO MAKES A WILL FOR ANOTHER IS TO ENDEAVOUR TO SET FORTH THE TESTATOR'S WISHES IN ENGLISH IN AS DIRECT AND UNCONDITIONAL TERMS AS HE CAN COMMAND. Some general observations were made by Lord President Inglis in *Colvin v. Hutchison*, 1885, 12 R. 947, which should be borne in mind. The "will," which in that case formed the subject of judicial consideration, was a very informal document. The Lord President observed—"The Lord Ordinary (Lord M'Laren) says that a testator 'must

declare his will in writing, and it is implied in this statement of the law that he must use significant words disposing of the estate.' In another part of his note his lordship says, 'I think that the testator's intention, if such exists, must take the form of a proposition of some kind.' In the first statement which I have quoted, that words of gift must contain a verb expressing conveyance or transference or bequest, I am not prepared to agree with him; and if by the second statement the Lord Ordinary intends to lay down that a gift or legacy must take the form of a proposition, or, in other words, of a completed sentence, I am also not prepared to agree with that statement. I do not think it matters how inelegant or how imperfect grammatically a testator's language may be if it can fairly be construed to mean that he bequeaths certain sums of money to certain individuals, sufficiently designed in the writing itself" (p. 955). In the circumstances the "document propounded was held to be a jotting and no will." But the Lord President said, "I do not mean to say that a paper of this kind, consisting of a mere schedule, as the Lord Ordinary calls it, may not be effectual if you can extract from it a testamentary intention and act of the will. Supposing the paper had been headed, 'This is the will of A, to B, £100; to C D, £200,' &c., and that it had been regularly subscribed, I am not disposed to say that I should not have given effect to it, if the persons to whom the legacies were left sufficiently ascertained and identified (*dummodo constat de persona*), and if the subjects or sums bequeathed were intelligibly described."

Ascertain intentions clearly and express them tersely.

Nomination of an executor.

A sound rule of practice is to ascertain clearly what the wishes of the testator are, and, having so ascertained them, to express them in as simple and terse language as may be. It is always desirable that an executor should be appointed, but the Executors (Scotland) Act, 1900 (63 & 64 Vict. c. 55), by sec. 3 provides—"Where a testa-

tor has not appointed any person to act as his executor, or failing any person so appointed, the testamentary trustees of such testator, original or assumed, or appointed by the Supreme Court, (if any), failing whom any general disponent, or universal legatory or residuary legatee appointed by such testator, shall be held to be his executor-nominate, and entitled to confirmation in that character."

Having reduced the wishes of the testator to the written form which seems suited to give them fitting expression, the minister preparing the will ought to read over its terms slowly and clearly to the testator, making sure that the latter fully apprehends the import of the document, and that it truly records his deliberate intentions. It should be superfluous to say that, before allowing an invalid to go on to execute a will, a clergyman who is asked to act in preparation of it should satisfy himself from his own observation that the would-be testator is in such a state of body and mind as to be capable of rationally understanding the dispositions proposed by him. This does not, of course, mean that the clergyman is to judge of the reasonableness of these dispositions. All that he is concerned with is that they are those desired by one who is apparently of sound disposing mind, and of whom no advantage is being taken when in a state of bodily infirmity. In order that there may be satisfactory evidence available in case of any questions arising, it is generally advisable that the reading over of the document should be in presence of witnesses who are not beneficiaries under it—preferably those authenticating the signature of the deed. And if there should be any special reason owing to the nature of the provisions or the weakness of the testator for apprehending challenge, it is advantageous if the trained observation of a medical attendant or skilled nurse can be made available.

Will as written should be read over to testator.

Apparent capacity of testator.

Position
where any
benefit is
conferred on
minister
assisting in
preparation.

Particularly necessary is it that such evidence of testamentary capacity and deliberate intention should be secured if under the will any benefit is given to the minister himself who acts in the preparation, or to pious objects in which he may be supposed to be specially interested. It is, indeed, in general undesirable that a minister should take an active part in preparing a will under which such a benefit is conferred, and it is a safe rule that he should not do so if any other competent party can be found to do what is necessary. But instances may readily occur in which the very confidence and esteem which leads the aid of a minister to be invoked in case of need in the preparation of the will may make the testator desirous of making him a legatee, or of benefiting the congregation or parish of which he is the minister. And if no one else can be got to prepare the will in such a case, the minister need not, provided due precautions are taken, hesitate to do so, or refrain from incorporating the bequest which the maker desires. For the fact that a benefit is conferred on the framer of a will does not (as does a benefit conferred on one notarially executing the will) render the will void, nor does it even necessarily avoid the benefit conferred. The rules applicable have in recent years been repeatedly expounded in the House of Lords; and, although the cases have primarily been concerned with wills made by solicitors on whom benefits have been conferred in them, the principles are of general application to any one who undertakes the duty of preparing a will. In the case of *Forrest v. Low's Trustees*, 1920 S.C. (H.L.) 16, Lord James of Hereford said (p. 17)—“Where a person is interested, vigilance should be exercised in seeing that the case, if he has to meet one, of undue influence is fully met, or the knowledge of the testator fully proved. There is no disqualification in the making of a will through the person who takes an interest having made it.”

The very special influence which, as spiritual ad-

viser, a clergyman may have over those under his supervision has indeed in a number of cases been recognised as a consideration of grave importance where there have been present other circumstances pointing to facility on the one side and advantage taken of it by coercion or circumvention on the other. But neither the existence nor the use of such influence will avoid a testamentary benefaction induced through it where it is admitted or established that the maker of the bequest has had testamentary capacity, full knowledge of what he has done, and was neither coerced nor circumvented in the matter. (Cf., per Halsbury, L.C., in *Weir v. Grace*, 1899, 2 F. (H.L.) 30, at 31). The most that can be said is that it is an element the existence of which in conjunction with an active part taken in the preparation of a will in which a benefit is conferred on the maker, or any object in which he may be supposed to be specially interested, renders it vitally important that there should be ample and independent evidence that the bequest is the free and intelligent act of a capable testator. The most recent authoritative exposition of the law on the matter in the case of *Stewart v. M'Laren*, 1920 S.C. (H.L.) 148, may be summarised in the following passage from the opinion of Lord Dunedin, at p. 153:—"In the ordinary case a will which is probative proves itself, and a person founding on its provisions need do no more than produce it. Those who wish to make the will inoperative as being obtained by deception or undue influence, or because the testator did not know what he was doing, must aver relevant facts, and prove them. But when the person who claims is the law agent who prepared the will, he is bound to do something more; he must clear himself from the idea that the gift in his favour was got by deception or undue influence, or that the testator did not know what he was about when making his will. That raises an issue of fact." (Cf. to a similar effect Lord Robertson in *Weir v. Grace*, *supra*,

Nomination
as executor
does not form
a ground of
complaint
against party
assisting.

2 F. (H.L.) at p. 37.) The party concerned in the particular case from which this passage is taken was a law agent, but the decisions show that the material factor is not the law agency, but the participation in preparation of the will under which benefit is claimed, at least where the beneficiary occupies a position from which influence normally arises. Mere nomination of the framer of the will as executor gives rise to no such question, this being appointment to a position of duty, not a benefit (*Smart*, 1926 S.C. 392, and see per Lord Shaw in *Forrest v. Low's Trustees*, *supra*, 1920 S.C. (H.L.) at p. 18).

Appropriate
solemnities of
execution.

Finally, having prepared the will, and having read it over and ascertained that it embodies the wishes of the testator, the minister should take care to see that it is duly executed. If the testator can write, he should either in his own hand write at the end of the document the words "adopted as holograph" and sign under these, or, preferably, he should sign the writing at the end (and also if on more than one sheet of paper, at the foot of each page) in presence of two witnesses who should see the signature, or have it acknowledged to them by the testator, and who should also sign, each adding the word "witness" to his signature. The designations of the witnesses should be recorded. It is sufficient if they be added under their names. But it is convenient, and helps to ensure attention to the requirements, that they should be recorded in a testing clause written at the end of the will, of which the following is a short but sufficient form:—

"In witness whereof I have subscribed these presents written on this and the preceding pages by X, minister of the parish of Y (or, as the case may be) on the day of , 19 , before these witnesses, A B (designation) and C D (designation)."

If the testator be unable to write, the execution will require to be (and if he be blind, it may be) done

notarially. And if this should be requisite, it must be remembered that the minister making the will is subject to the limitations and disabilities in regard to acting as notary which have been pointed out in the earlier section of the chapter.

STIPEND.

Definition.—TEIND: the proportion of the produce of the earth devoted to the maintenance of the clergy. Derivation: Icel. *tíund*, a tenth, and hence a tithe, from *tíu*, ten; Swedish, *tiende*; Gothic, *taihunda*.

SURPLUS, OR FREE TEIND, is the amount of teind within a parish unallocated for the payment of minister's stipend.

FREE TEIND may also mean teind payable to the lay titular by heritors having no heritable right to their teinds, or by tacksmen to the extent of the teind-duty paid by them to the titular.

Teinds,⁴ historically, may be PERSONAL or PREDIAL. The former are practically unknown in Scotland, the latter are NATURAL or INDUSTRIAL, and may be either PARSONAGE or VICARAGE teinds.

STIPEND, minister's salary, from *stipendium*, a tax tribute; put for *stipi-pendium*, a payment in money, derived from Lat. *stipi*—crude form of stipps, small coin; *pendere*, to weigh out, pay. "Stips is supposed to mean 'pile of money,' from *stipare*, to heap together; cf. *stipes*, a post (perhaps a pile)."—SKEAT.

The system of payment to clergy of the Church of Scotland hitherto prevalent, but now in course of being superseded under the operation of the legislation of 1925, dates from the reign of Queen Mary. By the Acts 1567, c. 10; 1581, c. 2 [100]⁵; and 1592, c. 89 [158]⁵, it was provided that, of the ecclesiastical benefices, one-third of their revenues should be devoted to the support of the clergy. The surplus was to belong to the King. The stipends to be paid were modified by commissioners out of the thirds. On the restoration of bishops in 1606 many of the benefices were exempted from payments towards this fund. By diminishing

History of origin of payment of stipend to reformed clergy out of teinds.

⁴For a history of teinds in Scotland—now, by reason of recent legislation, mainly of historical interest—reference may be made to Part V. of the last edition of the present work, and to the judgments in the case of *Galloway v. Earl of Minto* (Minto), 1920 S.C. 354; 1922 S.C. (H.L.) 24; especially to the monumental judgment of the Lord Ordinary on Teinds (Lord Sands), reported on pp. 358-382 of 1920 S.C.

⁵Alexander's Abridgement, pp. 69, 121.

the number of contributories, the fund at the disposal of the commissioners, and known as "thirds," was reduced, and the small stipends of the parochial clergy were made still smaller. The reform most desired by them was a system of LOCALISING the stipend. This was brought about by the 'Act 1617, c. 3,⁶ which gave power to the commissioners under the Act, "out of the said teinds of every parochin, to appoint and assigne at their discretions ONE PERPETUAL LOCAL STIPEND to the ministers present and to come," of all parishes without stipends, or with stipends of less than 500 merks annually, or five chalders of victual, or such proportion of money and victual as amounted to 500 merks, or five chalders of victual annually, with a manse and glebe. The maximum to be given by the commissioners as stipend was ten chalders victual, or 1000 merks (£55 11s. 11-3d.), or proportionally money and victual, with a manse and glebe. Another commission was appointed in 1621, with more liberal powers, inasmuch as the commissioners were not limited by any maximum or minimum of existing stipend. But it is believed the commissioners never acted. A commission was appointed in 1627, who were "to make sufficient provision for those churches wheirof the teyndis sall be reserved, and disposed as afoirsaid, if the saids churches be not already sufficientlie provydit, and for providing their ministers with sufficient local stipends and fees." This was ratified in 1633 (cc. 8 and 19),⁷ and the minimum of ministers' stipends fixed, generally, at eight chalders of victual or 800 merks. Of numerous subsequent Acts (*e.g.*, 1641, c. 30; 1649, c. 45), it may be sufficient to say that their object was directed to ensuring the augmentation of ministers' stipends to eight chalders of victual, or three chalders victual, and money for the other five. No maximum being

⁶ Alexander, pp. 143 and 144.

⁷ *Ibid.*, pp. 204, 222.

fixed by the Act 1633, the statutory maximum of 1617 has been held to be revoked; and, in 1720, the Lords of Council and Session (who had become in 1707 the permanent commissioners on teinds) augmented the stipend of a clergyman to 1200 merks, although in 1650 it had been fixed at 800 merks. Augmentations still continued down to the passing of the Property and Endowments Act, 1925, to be granted from time to time, provided—(1) that there was surplus or free teind in the parish; and (2) that twenty years had elapsed from the date of the final interlocutor authorising the last modification. The mode of calculating a minister's stipend, at augmentations, by victual is archaic and clumsy, and has caused frequent misunderstanding. The matter of augmentation is now regulated by the provisions of the Act of 1925, for which see *infra*, pp. 443 *et seq.*

When teinds were liable to be taken or drawn in kind, the annoyance caused by the delay of a titular to come promptly to the field and remove his share of the harvest must have been a prolific cause of heart-burning; for the crop could not be stacked till it was teinded. By Act 1606, c. 8, a heritor was entitled when fifteen days had elapsed after cutting his corn, to call upon the titular to teind the corn within eight days; if he failed to do so, the heritors might "teynd and stack the same themselves." By Act 1612, c. 5, the fifteen days of waiting were reduced to eight. Five years later the titular's days of grace were limited to four days after the expiry of the eight days, but the heritor was obliged to protect from cattle the corn he teinded for the backward titular for eight days on the field.^s The custom of compounding for teinding in kind was not unusual. The heritor and the titular agreed that so many bolls, hence called RENTAL BOLLS, should represent the teinds, and this much simplified tithe-paying wherever an agreement was come to.

DRAWN
TEIND; in-
conveniences
incidental to.

Compounding
for rental
bolls.

^s Connell, I., pp. 204, 205.

After the valuations introduced in Charles I.'s reign, teinding in kind fell into desuetude; but Mr. Elliot mentions that, strangely enough, one small piece of land he knew of had been teinded in recent years.⁹ This is an unexpected survival of what, even three hundred years ago, was felt to be an anachronism.¹⁰

Value of victual stipend hitherto ascertained by fiars prices.

The value of the victual in which a parish minister's stipend was usually in great measure calculated has hitherto been ascertained by the FIARS PRICES, which are struck every year by the Sheriff of each county. Take it that the minister's stipend is fixed at "such a quantity of victual, half meal, half barley, in imperial weight and measure, as shall be equal to twenty chalders of the late standard weight and measure of Scotland, payable in money according to the highest fiars¹¹ prices of the county annually, and that for stipend," with perhaps £10 "for furnishing Communion elements." This involves annually a fresh calculation of the stipend, as fiars prices vary; the calculated sum has to be collected from the parties liable in payment of teinds in such proportions as their teinds have been allocated upon in the minister's action of augmentation, modification, and locality when his stipend is fixed. In the last edition hereof

⁹ Elliot, p. 10.

¹⁰ On this whole subject cf. Lord Sands' judgment in *Galloway v. Earl of Minto*, at pp. 358 to 382 of 1920 S.C.

"Fiars prices" defined.

¹¹ "Fiars are the prices of grain in the different counties, fixed by the Sheriffs respectively in the month of February, with the assistance of juries. The form of striking the fiars is prescribed by Acts of Sederunt of 21st December, 1723, and 29th February, 1728. A jury must be called, and evidence laid before them of the prices of the different grains raised in the county; and the prices fixed by the jury, and sanctioned by the judge, are termed the fiars of that year in which they are struck, and regulate the prices of all grain stipulated to be sold at the fiars prices" (Bell's "Dictionary of the Law of Scotland," edited by George Watson, p. 458). The fiars prices, however, for the Archbishopric of Glasgow were not fixed by the Sheriff but by a justice of peace, who received depositions by witnesses, and modified, assessed, and taxed the price of each boll of meal, quarter of barley, &c. By Act of Sederunt of 29th January, 1918, passed to meet the exceptional conditions to which the Great War gave rise, it was provided that the Sheriffs might, in determining and fixing the fiars prices, dispense with a jury and proceed to determine and fix the fiars prices on such evidence as seems to them proper and sufficient. This provision is to continue operative until repeal of the Act of Sederunt, which has

concurrence was expressed in the view which had been announced by the Clerk of the Court of Teinds that augmentations of stipend should be awarded in sterling money and not in victual, and some means should be arrived at for converting permanently the present victual stipends into sterling money, perhaps on an estimate based on the average stipend, as fixed or deduced from fiars prices for seven years previous to such conversion. The Act of 1925 has, as will be seen, provided for permanent conversion, although on a basis differing considerably, by reason of the intervention of war conditions, from that desiderated by the Clerk: and, although augmentations are still modified in chalders of grain, the amount becomes permanently convertible into money with the rest of the victual stipend.

Effect of Act of 1925 on assessment of stipends.

The income of the clergy has in many cases been increased by the feuing of glebes under the provisions of the Glebe Lands (Scotland) Act, 1866. It is a question of circumstances whether the income from such feuing is considered when an AUGMENTATION is applied for. In the case of feuing of a normal glebe under the provisions of the Act it was held in the case of

Relation of feuing of glebes to income of clergy.

29 & 30 Vict. c. 71.

not yet taken place. In the case of *Walker v. Sheriff of Lothians, &c.* (Cranstoun), 1922 S.L.T. 169, a case in which it was sought to reduce a decree fixing fiars prices for crop and year 1920 as not having been properly fixed, it appeared that no jury was sworn, nor was oral evidence taken by the Sheriff as to sales of corn, but that he had obtained schedules from 129 selected persons, mostly farmers in the county, showing sales of grain for the year, and that these had been examined by a corn merchant and two accountants, who gave evidence of the results of their examination, on which the Sheriff proceeded. The Court held that the procedure was entirely justified. In *Minister of Cumbernauld, &c. v. Heritors of Dumbartonshire*, 1920 S.C. 625 (since followed in one or two other unreported cases), no fiars prices having been struck for barley at the Fiars Court for Dumbartonshire for the crop and year 1919, the Court of Teinds, at the instance of ministers whose stipends were payable partly in barley, fixed the prices of barley for the year 1919, and for succeeding years in which no barley prices should be struck for Dumbartonshire, at the highest fiars prices struck for barley for the adjoining county of Stirling. The Court proceeded under sec. 12 of the Teinds Act, 1808 (48 Geo. III. c. 138), but expressed the opinion that, even if the operation of that Act were confined to augmentations, the Court had power under its *nobile officium* to grant the remedy sought. In proceedings for standardisation under the Act of 1925, such a case is provided for by sec. 2 (1) (a) (*infra*, p. 417).

Kilmacolm, 3 R. 32, that the primary object of the Act being to benefit the incumbent and not to relieve the heritors of their obligation to provide a competent stipend out of the teinds, the income from the glebe feus should not be regarded as relevant in considering as to augmentation. But in the case of glebes exceptional in their extent or character the income from feus has been held to be a relevant consideration. (See *Stewart v. Lord Glenlyon* (Blair Atholl), 13 S. 787; *Stevenson v. Duke of Buccleuch* (Wilton), 1827, Shaw's Teind Cases, 137; *Minister of Wilton v. The Heritors*, 1925 S.C. 372.)

Right to stipend incidental to that to benefice.

Emergence of right.

"Competent and legal stipend," what is?

Every minister of the Church of Scotland is entitled with his benefice to receive a stipend. His right to stipend emerges with his induction (as does his right to manse and glebe) (*Earl of Kinnoul v. Presbytery of Auchterarder*, 1838, 16 S. 769)—meaning by "induction" admission to the office of parish minister—for stipend is "a permanent fund" (per Lord Shand, *Hastie v. M'Murtrie*, 1889, 16 R. 734). His right, if he succeeds to a predecessor admitted prior to the passing of the Act of 1925, is subject to the claims of the executors of the former incumbent to ann, if the benefice has been vacated by death. For circumstances relating to an obligation to provide "A COMPETENT AND LEGAL STIPEND not under" a certain sum, see *Magistrates of Greenock v. Peters*, 1893, 20 R. (H.L.) 42, affirming the judgment of the Second Division, 1892, 19 R. 643, and *Rainie v. Newton-on-Ayr Magistrates*, 1895, 22 R. 633. See also *Peters v. Magistrates of Greenock*, 1894, 21 R. 886, where the Court fixed the amount of stipend to be paid, with interest at 2 per cent. from 1880 (when the minister first made his claim to an increase of stipend) to 1891 (when he raised his action), and with interest at 4 per cent. on arrears accruing thereafter. Another Greenock minister raised an action (*Thomson v. Magistrates of Greenock*, 1896, 23 R. 405) for payment of a stipend of £400. The Court assoil-

zied the Magistrates of Greenock and distinguished the case from that of *Peters*. In the subsequent case, two years later, of *Rainie v. Newton-on-Ayr Magistrates*, 1897, 24 R. 606, in circumstances where a burgh was bound to provide a legal and competent stipend in addition to a manse, cow's grass, and allowance for Communion expenses, the Court fixed £300 as the stipend so to be provided. The Court was influenced in its decision by the circumstances of the benefice and the average stipend in the surrounding and neighbouring parishes. In the case of *Rattray v. Glasgow Corporation*, 1921 S.C. 522, the obligation of Glasgow Corporation to provide a competent and legal stipend to the ministers of each of several city churches was dealt with, and its extent defined variously according to the differing terms of the documents of erection of the respective city churches.

Each payment of stipend is subject, by the Act 1669, c. 9, to a QUINQUENNIAL PRESCRIPTION, unless Prescriptions applicable to stipend. resting-owing be proved by writ or oath. A right to stipend is acquired by uninterrupted payment of stipend for FORTY years to the occupant of a cure (*Boswell v. Town of Kirkcaldy*, 1668, Mor. 10,890; *Minister of Eyemouth v. Officers of State*, 1756, Mor. 15,677; *Baird v. Minister of Polmont*, 1832, 10 S. 752; and see also *Bain v. Officers of State* (Maryhill), 1858, 20 D. 1006).

By the Teinds Act, 1810, a parish minister whose stipend did not exceed £150 sterling annually, and whose income could not be augmented to that amount from the parish teinds, either because they were exhausted or the free amount was too small to warrant an augmentation, was entitled to have the requisite sum paid out of a sum of £10,000 of public funds; the Teind Court could award the unexhausted teind, such as it was, to him before granting assistance from the public funds. By the Teinds Act, 1824, a further sum of £2000 annually was made available 50 Geo. III. c. 84. Parliamentary augmentations of certain small stipends. 5 Geo. IV. c. 72.

from public funds, and a parish minister having no right to a manse and glebe, and whose income was under £200 sterling per annum, became entitled to an allowance making up his stipend to a sum not exceeding that amount; if there was a manse but no glebe, or a glebe and no manse, the minister's income might be supplemented so as to ensure him £180 per annum. An allowance of £23 for manse and glebe rent was not held equivalent to a manse and glebe (*Procurator for Church v. Officers of State* (Ayr), Jan. 23, 1828, Shaw's Teind Cases, 148). Provision was made for quinquennial returns from Presbyteries, showing the state of the parishes affected, being rendered to the Clerk of Teinds with a view to periodical revision by the Teind Court; but in later years such revision seems not to have been regularly made. Ministers under these Acts are also entitled to an allowance of £8 6s. 8d. for Communion elements.

Statutory
provision for
Highlands
and Islands.

By 4 Geo. IV. c. 79, and 5 Geo. IV. c. 90, which were Acts for providing additional places of worship in the Highlands and Islands, ministers under these Acts (who had also manses provided) were entitled to a stipend not exceeding £120, inclusive of cost of Communion elements.

Under the Property and Endowments Act, 1925, provision is made for payment to the General Trustees by the Treasury of the annual sums presently paid under these various Acts, for the redemption of these by a capital payment in the option of the Treasury, and for the administration by the General Trustees of the sums thus coming into their hands under schemes by the Scottish Ecclesiastical Commissioners (secs. 19 and 39, and Schedule VII.). This has now been done by Scheme of the Commissioners, No. 1, dated 21st July, 1926, which under reservation of the interests of ministers in office at the passing of the Act provides for administration of the income of the sums paid over under the Act by the General Trustees

on the existing lines, but subject to extensive powers of re-allocation by direction of the General Assembly.

By 7 & 8 Vict. c. 44 (the New Parishes Act), the stipend of ministers of *quoad sacra* parishes is fixed—where there is a manse—at not less than £100 per annum, or seven chalders of oatmeal calculated at the highest fiars prices of the county, exclusive of a sum for Communion elements, and where there is no manse, at not less than £120 per annum or eight chalders of oatmeal similarly calculated. These stipends, though secured as a condition of the erection of the parish, are in their origin voluntary, and are provided through the endowment schemes of the Church for the most part. The provisions of 50 Geo. III. c. 84 and Geo. IV. c. 72 were not applicable to parishes created under 7 & 8 Vict. c. 44, although the minister's stipend was less than £150 per annum.

Stipends of ministers of *quoad sacra* parishes.

Before a SECOND MINISTER can obtain a modification or augmentation of stipend there must be either a special agreement on the part of the heritors that his stipend be payable out of the teinds, or his appointment *qua* parish minister must be one made by the Parliamentary Commissioners or the Teind Court (*Falkirk* case, 1707, Connell, "Parishes," p. 121; *Elgin*, 1714, *ibid.*, 129; *Old Machar*, *ibid.*, 131; *Culross*, *ibid.*, 133; *Marshall v. Town of Kirkcaldy*, 1738, Mor. 14,795; *Fairnie v. Heritors of Dunfermline*, Mor. 14,796; *Inveraray* case, Connell, 146; *Buist v. Cheape* (St. Andrews), 1822, Shaw's Teind Cases, 23; *Magistrates of Haddington v. Kennedy*, 1859, 21 D. 734).

Position of "second minister" as to stipend.

The MINISTER OF A SECOND CHARGE is not entitled to an augmentation (*Buist v. Cheape* (St. Andrews), 1822, S.T. 23) (except as above mentioned); nor is a minister deriving stipend from voluntary contributions; nor a minister of a *quoad sacra* parish (under 7 & 8 Vict. c. 44); nor a minister deriving income under 50 Geo. III. c. 84 or 5 Geo. IV. c. 72; nor an assistant and successor (*Macruer v. Macnicol*,

Ministers who are not entitled to augmentation.

Minister may not alienate his right to augmentation to prejudice of benefice.

When is application for augmentation competent?

15 & 16 Geo. V. c. 33.

Right to AUGMENTATION where assistant and successor and minister non-resident.

Augmentation of stipend.

Procedure in application for augmentation.

Former procedure superseded by 1925 Act.

Modified by Act of 1925.

1803, Mor. 15,711; *Shaw v. Heritors of Robertson*, 1806, Mor., Stipend, App. 5). A minister cannot alienate his own or his successors' right to claim an augmentation (*Stewart v. Earl of Fife* (Turriff), 1800, Mor., Stipend, App. 4). But a special stipulation in the decree erecting a benefice may exclude a demand (*Magistrates of Kilmarnock v. Aitken*, 1849, 11 D. 1089). By 48 Geo. III. c. 138, an augmentation could not be applied for within twenty years of the last augmentation; but under sec. 10 of the Property and Endowments Act, 1925, the first augmentation provided for under that section may be applied for on the expiry of ten years from the passing of the Act or of twenty years from the last application for augmentation, whichever is the earlier; and no augmentation can be applied for after the expiry of eleven years from the passing of the Act.

In a case where the Teind Court granted an augmentation in a process raised by a parish minister who had by agreement with the parishioners ceased to reside in the parish, and whose duties were discharged by an ordained assistant who received from the minister the greater portion of his salary, the Court directed that the augmentation should be paid to the assistant (*Minister of Carsphairn v. Heritors*, Mar. 13, 1893, 20 R. 521; and see *Lord Mountstephen's Trustees v. Morgan* (Rothes), 1903, 11 S.L.T. 362).

The procedure by which a parish minister sought an augmentation of stipend was regulated by 48 Geo. III. c. 138 and relative Acts of Sederunt, the final form of which was contained in the Codifying Act of Sederunt of 1913, Book H, chap. ii. An account in some detail was given in the last edition of the procedure as existing at its date. But under sec. 10 of the Property and Endowments Act, 1925, the then existing law relating to augmentation ceased to have effect on the passing of the Act, save as regarded any application for augmentation competently made before such passing, of which instances still pending must

be few, if any. Following up the recommendation by the Departmental Committee presided over by Lord Haldane (Report, p. 18), that "It should also be considered by the Teind Court whether in the changed circumstances the procedure in final applications" under the Act "could be simplified and the expense correspondingly diminished," paragraph 2 of the Fourth Schedule to the 1925 Act provides that any application to the Lord Ordinary, and the localling of any augmentation and any decree of locality following thereon, shall, subject to the provisions of the Act, be made and dealt with in such manner as the Court of Session shall by Act of Sederunt prescribe. (See *infra*, pp. 443, &c.) It is, therefore, quite unnecessary to reproduce the statement of the former procedure.¹²

The following points, however, which deal with matter of substance rather than with mere procedure, are still worthy of notice, as they may affect proceedings taken under the new Act.

Points in former decisions which are still important.

In any AUGMENTATION PROCEEDING, if a heritor has had his teinds VALUED, then in no case can he be called upon to pay more than the amount of that value, provided he is prepared to SURRENDER, and tenders a surrender of the teinds in perpetuity. (See *Galloway v. Earl of Minto, infra*.) Similarly, under the same condition, if he has purchased his teinds, he is liable up to the amount of the annual value as fixed by the valuation which preceded that sale, and for no more. But a heritor may purchase from the titular without a valuation, in which case the teinds will have as yet no fixed value; a titular, however, cannot be compelled to sell except at a price arrived at after a valuation. The amount of the teind so long as unvalued is taken at one-fifth of the land rent or arable value, but until it is valued a heritor cannot free himself of greater liability by tendering surrender (*Galloway v. Earl of Minto, infra*). A heritor who has

Position where teinds valued.

Necessity of surrender.

¹² As to augmentation see further Elliot, "Teind Court Practice," p. 2 (footnote), pp. 67 *et seq.*; Buchanan "On Teinds," p. 257.

purchased his valued teinds may surrender them in favour of the parish minister; by so doing, he frees himself and his lands from liability for any augmentation of stipend in future; the minister by this surrender becomes titular of these teinds.

Recent cases on augmentation, valuation, and surrender.

The abnormally high point to which conditions arising out of the war carried grain prices gave a new practical interest to questions as to valuation and surrender where augmentations had led to stipends which on the current fars prices exceeded the value at which the teinds on which they were charged had been, or might be, valued; and several cases in the Court of Teinds resulted. Of these the leading were *Lord Dalhousie v. Minister of Barry* (Barry), 1915, 1 S.L.T. 392; *MacKenzie v. Stuart* (Kirkton), 1919 S.C. 20; and *Galloway v. Earl of Minto* (Minto), 1920 S.C. 354; 1922 S.C. (H.L.) 25. Reference may also be made to the following cases, in addition to those cited in the last edition, as illustrative of prior recent developments of the law:—*Lord Elibank's Trustees v. Hart* (Aberlady), 1888, 15 R. 927; *Lord Elibank's Trustees v. Hope* (Aberlady), 1891, 18 R. 445; both dealing with questions of reports of valuations made by the Sub-Commissioners of Teinds in the early stages of valuation, but which had not been approved by the High Commission or Court of Teinds. In the case of *Galloway v. Earl of Minto* in particular (decided at a time when the legislation destined to relegate the whole fabric of stipend and teind law as heretofore existing to a place of merely historical interest was in process of being formulated) the whole development of the law affecting these questions contained in statutes and decisions was elaborately considered; and the judgments—especially those of Lord Sands as Lord Ordinary on Teinds and of Lord Dunedin in the House of Lords—must ever be classic as guides to students of the subject. The result of the *Minto* case, as decided by Lord Sands, was as follows:—Where a heritor has not surrendered his teinds to the

Process of being formulated.

Minto case.

minister in perpetuity, he is bound in each year to pay to the minister the full amount of stipend localled upon him. Accordingly, even where the teinds have been valued and the amount of stipend localled upon them in victual exceeds in value the money value of the teinds, the heritor cannot tender instead of the localled stipend the valued money value of the teinds, except upon such complete surrender. And similarly, where the teinds are unvalued and the amount of stipend localled in victual exceeds in value one-fifth of the rent of the lands (which would have formed the basis of valuation) he cannot tender, instead of the localled stipend, one-fifth of the rent. The Lord Ordinary's judgment as regards the valued teinds was affirmed by the Court of Teinds and by the House of Lords. In respect of an admission by the heritor that failure on his part as regarded the valued teinds would necessarily involve failure as regarded those which were unvalued, the part of the Lord Ordinary's judgment dealing with the latter was not specifically dealt with in the findings of the higher Courts. But both in the Court of Teinds and in the House of Lords approval was expressed in the course of the judgments of the decision of the Lord Ordinary with regard to them. Certain questions upon which in course of his judgment Lord Dunedin made observations regarding the surrender of teinds to which the party desiring to surrender had not a heritable right, or which could not be sold, have been superseded by the provisions of the Property and Endowments Act regulating sale and surrender for the future. (See secs. 16 and 18.)

In preparing a SCHEME OF LOCALITY, the teinds to be first stated are (1) those which the minister holds in virtue of such a surrender; there fall next to be exhausted (2) the teinds in the hands of the titular of the teinds, including the patron *qua* titular—teinds under tack being postponed to teinds to which the heritor has not even a temporary right; if those two

Order of liability of various classes of teinds.

are exhausted (3) the teinds held by heritable title, acquired by purchase from the Crown or other titular, are liable; upon their exhaustion (4) the bishops' teinds held by the Crown are liable,—but if such teinds have been sold the purchaser falls into the third rank, that of heritable proprietors, and his teinds will be allocated upon for stipend before those which still belong to the Crown. Assuming that all the other classes are exhausted, then (5) the teinds belonging to colleges; and lastly (6) teinds appropriated to pious uses, including teinds granted to the Deans of the Chapel-Royal, are localled upon.

Number of cases in which augmentation is now possible restricted by exhaustion of teinds.

While the right to augmentation has been to a limited extent conserved under the Property and Endowments Act, it should be noted that Lord Haldane's Committee, in their Report of 1923 (p. 16), called attention to the fact that from the Parliamentary Return on Teinds, dated 6th May, 1907, it appeared that the teinds were then exhausted in 502 out of the total of 880 old parishes, and pointed out that between 1907 and 1923 there had been 122 further augmentations of stipend which it was safe to assume had increased the number of parishes in which teinds were exhausted. Further, at the time of the 1907 return there were 133 parishes in which the free teind was under £100, a number which must have been increased by later augmentations. The Committee, therefore, concluded that—"It thus appears that the actual number of parishes in which there is any substantial amount of free teind out of which augmentations of stipend could be granted is comparatively small. Even that number is being gradually reduced under the present system of periodical augmentations granted by the Teind Court." The extent to which the anticipation expressed has been realised has probably been augmented by the fact that, in view of the known imminence of the passing of the Property and Endowments Act, augmentations tended to be applied for in the interests of the bene-

fice which might normally have been held over to a later date.

A minister's stipend is attachable for debt. No portion of it is specifically alimentary, but a minister will be allowed, even against creditors, to keep enough to ensure an alimentary provision sufficient to enable him to discharge the duties of the cure (*Minister of Linton v. Creditors*, 1736, cited in *Smith v. Earl of Moray* (Petty), Dec. 13, 1815, F.C.; *A B, Petitioner*, 1823, 2 S. 526; *A B v. Sloan*, 1824, 3 S. 195; *Learmonth v. Paterson*, 1858, 20 D. 418). A minister who was assistant and successor to a parish minister had emoluments of £106 a year, and debts amounting to £1100. He applied for *cessio*, and it was held by the First Division of the Court of Session that he was entitled to the benefit of *cessio* on his assigning £20 a year to his creditors—Lord Shand, however, observing that if the minister (assistant and successor) applied for his discharge, it might be fairly argued that, in view of his income being certainly increased in the event of his surviving the parish minister, on the death of the latter a larger sum should be provided (*Simpson v. Jack*, 1888, 16 R. 131). In the later case of *Leslie v. Cumming and Spence*, 1900, 2 F. 643, it was held that a minister with an income of £273 should assign £80 per annum for the benefit of his creditors as a condition of his discharge. The minister's sequestration had continued for nearly six years, and from May, 1894, to January, 1895, the creditors had awarded him an allowance at the rate of £130 a year, and subsequently £106 a year. "This seems to me," said the Lord President (Balfour), "to be too small an allowance to enable a gentleman of the petitioner's position to live and perform the duties of his office." The minister was a man of seventy, and his sequestration was not due to extravagance on his part, but to the fact that he was the heir to a small estate on which he and his father expended considerable sums, and which fell

How far is stipend attachable for debt?

so greatly in value that when sold it fetched less than the amount so expended. In *Mackintosh v. Green*, 1908, 25 Sh.Ct.Rep. 41, the Sheriff-Substitute at Dingwall (Mackenzie) held that where a parish minister paid £40 a year to creditors, and his free income was £131 8s. 9d., a trustee for creditors under a subsequent sequestration was not entitled to a fuller assignation of stipend,—this on the dominant principle that the holder of a public office must be allowed a competence to fulfil the duties of the office.

Income tax
on stipend.

Income tax is payable on all stipend even if a portion of it be applied to paying the salary of an assistant. Under the general rules applicable to Schedules A, B, C, and D appended to the Income Tax Act, 1918, it is indeed provided (rule 2 (1)) that “In assessing the tax chargeable under any Schedule upon a clergyman or minister of any religious denomination, the following deductions may be made from any profits, fees, or emoluments of his profession or vocation:—

“(a) any sums of money paid or expenses incurred by him wholly, exclusively, and necessarily in the performance of his duty as a clergyman or minister.”

This provision has been construed as applying only to expenses incurred by a minister in the personal performance of his duty, *i.e.*, of what is either part of his ordinary parochial duty, or of a duty enjoined upon him by his ecclesiastical superiors. (See *Charlton v. Corke* (Stranraer), 17 R. 785, approved in *Jardine v. Inland Revenue* (Keir), 1907 S.C. 77, at 81.) On this principle it was held in *Lothian v. Macrae* (Hawick), 12 R. 336, that the claim to deduction did not apply to a sum of money contributed by a minister who from his age required the services of an assistant to make up that assistant's salary to a certain fixed sum, the rest of which was raised by the congregation. If, however, the emoluments of the office should become charged with a sum payable

to some other person (*e.g.*, such an assistant), the minister would have right under rule 16 applicable to Schedule E of the Act to deduct from that sum such sum as the tax thereon would amount to. In this way a minister would be practically relieved from the tax on the portion of his stipend assigned towards the remuneration of a duly appointed assistant and successor. And even in the case of an ordinary assistant, if the contract of employment required the definite appropriation of a sum out of the stipend for salary of an assistant, the minister would probably be entitled to deduct it in estimating his "total income" for any relevant purpose. In *Jardine's* case (*supra*), it was held that the duty, such as it was, of applying for an augmentation was not a duty which satisfied the test above mentioned, and that the expense of such an application was not a proper deduction. On the other hand, the minister was found entitled to a reasonable sum for the expense of keeping a horse and carriage to enable him to get about his parish, and for expense incurred in connection with the celebration of Communion in the parish. It was indicated, but not decided, that the allowance for "Communion elements" did not form taxable income at all. As to this and other permissible deductions much useful guidance will be found in Mr. Burns' "Income Tax Guide," 5th edn., at pp. 99-101, where a full and suggestive list is given of deductions which practice has sanctioned. (See also *supra*, p. 376.)

A minister's right to stipend terminates with his death, deposition, resignation, or translation to another charge. If his interest in the benefice ceases before 15th May (Whitsunday), he receives, in the case of victual stipend at common law, no part of the stipend of the year's crop; if between 15th May and 29th September (Michaelmas), he receives one-half; if after 29th September, he receives the whole stipend (Stair, ii. 8, 33; Erskine, ii. 10, 54). If the stipend be modified in money, or be a money stipend payable

Termination
of right to
stipend.

from endowments, vesting depended prior to the Act of 1925 on the terms when it was payable. In the ordinary case the Apportionment Acts (4 & 5 Will. IV. c. 22 and 33 & 34 Vict. c. 35) did not apply to victual stipends payable at common law (*Latta v. Edinburgh Ecclesiastical Commissioners*, 1877, 5 R. 266).

In cases where an assistant and successor has been appointed to a parish minister, he succeeds on the death or removal otherwise of the incumbent (subject to the right of the minister's representatives to "ann") without fresh admission.

"Vacant stipend."

In the other cases above-mentioned "VACANT STIPEND" may arise. This is stipend accruing during a vacancy; and, so far as it did not go to "ann," it formerly enured, under the Act 54 Geo. III. c. 169, to the benefit of the Widows' Fund of the Church while the vacancy lasted. And it does so still, but to a more limited extent. "Vacant stipend" has recently been more precisely defined and its application modified and regulated by the Church of Scotland Ministers' and Scottish University Professors' Widows' Fund (Amendment) Order Confirmation Act, 1926, amending the earlier Order of 1923.

By sec. 2 of the amending Order it is provided that—

(2) The meanings assigned by sec. 3 of the Order of 1923 to the words and expressions . . . "VACANT STIPEND" are hereby repealed, and in place of the meaning assigned therein to "vacant stipend" the following words shall be deemed to be part of sec. 3 of the said Order, and the said Order shall be read and construed as if "VACANT STIPEND" had from and after the passing of the Church of Scotland (Property and Endowments) Act, 1925; the following meaning assigned to it, viz.:—

"VACANT STIPEND" means the stipend which accrues during the period of a vacancy in a

benefice caused by the death, translation, resignation, or deprivation of the minister thereof, AND WHICH WOULD HAVE VESTED IN SUCH MINISTER HAD HE CONTINUED IN POSSESSION THEREOF according to the law and practice applicable to the benefice for the time being, excluding any modification of stipend not yet modified at the date of the death, translation, resignation, or deprivation of such minister.

The application of "vacant stipend" as from the passing of the Property and Endowments Act is regulated by sec. 27 of the Order of 1923 as now amended by sec. 4 of the amending Order of 1926, which is in the following terms:—

4. Sec. 27 of the Order of 1923 is hereby repealed, and in place thereof the following words shall be deemed and be taken to be sec. 27 of the said Order, and the said Order shall be read and construed as if the said section had from and after the passing of the Church of Scotland (Property and Endowments) Act, 1925, been expressed as follows—that is to say:—

27. (a) "VACANT STIPEND" shall continue to be payable to the Fund SUBJECT TO THE PROVISION that in the case of any benefice (other than a benefice to which sub-sec. (c) hereof or the proviso to sub-sec. (d) hereof is applicable) remaining vacant for a longer period than six months THE VACANT STIPEND ACCRUING AFTER THE EXPIRY OF SUCH PERIOD OF SIX MONTHS SHALL NO LONGER BE PAYABLE TO THE FUND, BUT SHALL BE PAYABLE TO AND RETAINABLE BY THE GENERAL TRUSTEES, to be applied by them towards the cost of maintaining the ordinances of public worship in the parish to which the stipend is applicable or to such other purposes as they with the sanction of the General Assembly may lawfully apply the same, AND THE FUND SHALL HAVE NO RIGHT OR INTEREST IN ANY VACANT STIPEND ACCRUING AFTER THE EXPIRY OF THE

Subject to certain exceptions vacant stipend, after six months, no longer goes to the Fund.

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FIRST SIX MONTHS OF A VACANCY IN ANY BENEFICE OTHER THAN AS AFORESAID.

(b) Subject as and to the extent aforesaid vacant stipend shall henceforth be levied in manner hereinafter mentioned by the Trustees and paid to the collector, who is hereby authorised to receive and discharge the same by himself or his deputy, and who is also hereby authorised and required to apply the produce thereof to the purposes of the Fund under deduction of the expenses of collection.

Saving of
ann where
due.

Provided that nothing in this Order contained shall affect or be construed to affect any right which the widow and nearest of kin of a deceased minister may have by law in name of ANN.

Temporary
provision
while stipend
not yet
standardised.

(c) As often as vacant stipend shall arise in any benefice the stipend whereof is CAPABLE OF STANDARDISATION in terms of the Church of Scotland (Property and Endowments) Act, 1925, BUT HAS NOT YET BEEN SO STANDARDISED, the clerk of the Presbytery within the bounds of which such benefice is situated is hereby expressly required within one month after the term of Whitsunday or Michaelmas at which such vacant stipend shall become due to make intimation thereof by a writing under his hand to the collector, and shall transmit to the collector an attested copy of the locality of the stipend, with a list of the several heritors with their addresses and the business addresses of agents or factors who represent heritors or others for the time being by whom such vacant stipend is payable and of the proportion thereof payable by each of them: and such clerk is also hereby required within one month after such vacant stipend shall become due to give intimation or notice in writing to the several heritors and others by whom the same may be due that they are required under the authority of this Order to make payment thereof to the collector or his deputy

demanding the same, PROVIDED THAT UPON STANDARDISATION OF THE STIPEND OF ANY SUCH BENEFICE THE PROVISIONS OF THIS SUBSECTION SHALL CEASE TO APPLY. Ceasing upon standardisation.

(d) As often as vacant stipend shall arise in any benefice (other than a benefice to which the provisions of the immediately preceding sub-section hereof are applicable) such vacant stipend shall SUBJECT AS AND TO THE EXTENT AFORESAID be collected on behalf of the Fund by the General Trustees, and the General Trustees shall within one month after the term of Whitsunday and Martinmas in each year pay over to the collector of the Fund or his deputy all such vacant stipend to which the Fund may be entitled as hereinbefore provided under deduction of a charge at the rate of two per centum thereof to cover the expenses of collection and accounting.

Provided that in the event of vacant stipend being payable out of the income of properties and endowments (whether statutory or otherwise) which have not been transferred to or vested in the said General Trustees, such vacant stipend shall be levied and collected on behalf of the Fund in accordance with the law and practice heretofore existing and in use. Saving for income from properties not vested in General Trustees.

The claim of the Widows' Fund to vacant stipend is thus restricted to the stipend accruing during the first six months of the vacancy except in two cases, viz. (a) where stipend capable of standardisation has not yet been standardised at the date of a vacancy, in which case the collector of the Widows' Fund will be entitled to receive the vacant stipend even after the lapse of six months, UNTIL STANDARDISATION IS EFFECTED; and (b) where stipend is payable out of properties or endowments, whether statutory or otherwise, which have not been transferred to or vested in the General Trustees. In the former case, all Sec. 4 (c). Sec. 4 (d).

stipend which has accrued and which has become payable prior to the date of standardisation (*i.e.*, normally the first term of Martinmas occurring not less than six months after the first vacancy) goes to the fund. As this date may be the second Martinmas after a vacancy, and moieties vest at Whitsunday and Michaelmas and become payable after the striking of fiars prices early in the following year, it is obvious that more than six months' stipend may in the case of a first vacancy both accrue and become payable prior to the date of standardisation. It is clear that these go to the Fund. But where a vacancy occurs at such a date that the date of standardisation intervenes, and the stipend becomes standardised between the terms at which the moieties accrue and the date when, on the fixing of the fiars prices they become payable, the terms of the proviso to sub-sec. 27 (c) suggest a difficulty. Reading literally, immediately on standardisation being effected (*i.e.*, apparently as at the "date of standardisation"), the provisions of sec. 27 (c) in favour of the Fund cease to apply. On a very literal reading of this it would appear that if six months have then elapsed since the occurrence of the vacancy, any stipend which has ACCRUED after the expiry of the six months but before the date of standardisation, but which has not become legally PAYABLE until after the latter date, would automatically fall under sec. 27 (a) and be payable to and retainable by the General Trustees. But this result would hardly seem to be reconcilable with the substantive provisions of the sub-section under which notices requiring payment to the collector of the Fund of the stipend "due" (*i.e.*, accrued) at Whitsunday and Michaelmas will fall to be issued prior to the arrival of the date of standardisation. And if the sub-section as a whole can be construed (as it is thought it can) as giving to the Fund such a vested right to all that has accrued at terms prior to the Martinmas of standardisation as is not to be defeated although payment is not exigible

until later, it is hardly reasonable to adopt a literal construction which would render this procedure nugatory, as would be the case if the occurrence of standardisation were automatically to wipe out all in sec. 27 (c).

In cases falling under the proviso to sub-sec. 27 (d) it is clear that transfer to or vesting in the General Trustees of the properties or endowments from which the stipend is payable will bring the case within the general rule restricting the claim of the Widows' Fund.

As in a question with the Widows' Fund the following special provision as to vesting of stipend in the case of the FIRST MINISTER OF A PARISH applies. Sec. 3 of the Order of 1926 directs that the Order of 1923 shall be read as if, from and after the passing of the Property and Endowments Act, sec. 18 thereof were as follows:—

For the purposes of this Order THE FIRST MINISTER OF ANY PARISH WHICH MAY HEREAFTER BE ERECTED shall be deemed as having been admitted to his benefice on the day next after the date of erection of such parish, and subject as hereinafter provided he shall be held to have enjoyed and to have had right to his benefice as from that day: Provided that where the stipend in any such parish does not according to the law and practice applicable to the benefice for the time being vest *de die in diem* the first minister thereof shall be held to have enjoyed and to have had right to his benefice for one half-year at the first of the following dates, namely, the fifteenth day of May and the twenty-ninth day of September—happening next after the date of such erection.

Vesting provision in case of first minister in question with Widows' Fund.

The provisions of the Widows' Fund Acts and Orders apply to the case of all holders of benefices in the Church of Scotland, and therefore to the stipends of ministers of parishes *quoad sacra* as well as *quoad omnia* (*Grant v. M'Intyre*, 1849, 11 D. 1370, and *Cheyne v. Cooke and Others*, 1863, 1 M. 963).

Apart from
intromission,
owner of bare
superiority
not liable for
stipend.

A proprietor who has a BARE SUPERIORITY over lands, or one who has a security right over lands, on which no possession has followed, and who has not intromitted with the fruits, is not liable for minister's stipend (*Jackson v. Cochrane* (Cupar-Fife), 1873, 11 M. 475); for it is intromission with crop that renders a proprietor liable for stipend (per Lord Cowan in *University of Glasgow v. Pollok*, 1868, 6 M. 878 at 884).

STIPEND AS AFFECTED BY THE PROVISIONS OF THE PROPERTY AND ENDOWMENTS ACT, 1925.

15 & 16 Geo.
V. c. 33.

Summary of
the general
effect of Act
on the posi-
tion of a
parish
minister in
regard to
stipend.

The provisions of the Church of Scotland (Property and Endowments) Act, 1925, materially affect the position of parish ministers (especially those of old parishes *quoad omnia*) in relation to stipend. Hitherto these ministers have been, as has been shown, stipendiaries on the teinds, and have thus enjoyed a share of the fruits, of the soil of the parishes to which they minister. Under the Act the rights of all ministers in the enjoyment of benefices at the date of the passing of the Act are carefully conserved. But subject to this qualification, when the provisions of the Act have become fully operative the right of a parish minister will practically cease to be one entitling him as holder of the benefice to remuneration directly and by virtue of its occupancy from the fruits of the soil of the parish to which he ministers. Instead, a minister will be the holder of a benefice indeed—but of one the emoluments of which will be determined by what will be essentially a contract between him and the Church; and these will be payable to him no longer from individual heritors but by the Church through its General Trustees, who alone will continue to have relation as creditors with those hitherto liable as heritors in payment. This is, as regards the minister, the net result of the changes which the Act was designed to effect.

Broadly speaking, the provisions of the Act in relation to STIPEND have been governed by these considerations, namely—

Considerations governing its provisions.

(*First*) The conservation of the rights of existing incumbents as at the date of the passing of the Act, excepting in so far as these incumbents may themselves consent to the modification of their rights.

(*Second*) Subject to this, the substitution for a fluctuating victual stipend payable to the minister out of teinds of a fixed annual payment representing the equivalent in money, on an average, of the former victual stipend, this money payment being payable to a body of trustees (the General Trustees), incorporated and acting as representative of the Church of Scotland. As from the date when this fixed money payment falls to be settled ("DATE OF STANDARDISATION"), the amount thereof (the "STANDARD VALUE") will become payable by the heritor by whom it is due to the General Trustees, who will have all the powers of recovery which according to the existing law and practice a minister has with respect to his stipend (sec. 8). This is, however, merely a transitional stage, leading up to—

(*Third*) The conversion of this standard value—so soon as the teinds roll, to be made up for the parish in terms of the Act, has become final—into a "STANDARD CHARGE" upon the lands from the teinds of which the stipend has hitherto been exigible. This standard charge will be payable to the General Trustees, will be preferable to all other securities or burdens which are not incidents of tenure, and will be recoverable in manner similar to a feu-duty (sec. 12 (1), (2)).

(*Fourth*) The REDEMPTION of this STANDARD CHARGE, and upon redemption the extinction of all claim against the heritor by whom it has been payable and his lands; and, as incidental to this, the immediate extinction of any standard charges payable by a

heritor the amount of which is so insignificant that the total stipend exigible from the whole teinds in the parish belonging to the heritor affected does not exceed one shilling annually. (This provision was designed to get rid of the annoyance incidental to the enforcement of redemption upon small proprietors, which might have been disproportional to the value of the payments for which they would have been liable.)

(*Fifth*) The appropriation of all money so received by the General Trustees as stipend primarily to meet the proper requirements of the parish from which such money is derived or of its neighbourhood, as these shall be determined by the Church itself, through the General Assembly; and

(*Sixth*) The rendering available of any remainder after these requirements have been fully met as part of a general fund at the disposal of the General Assembly.

While these principles are most fully exemplified in their relation to the stipends of ministers of the old *quoad omnia* parishes, the same results are in substance provided for in regard to all other classes of parishes, viz., parliamentary endowed parishes in the Highlands and Islands and elsewhere, burgh churches, and parishes erected *quoad sacra tantum* under the

7 & 8 Vict. c. 44. New Parishes Act, 1844, and Acts amending or extending this Act.

OLD PARISHES QUOAD OMNIA.

Dealing first with the case of these parishes, the following are the detailed provisions affecting them:—

Stipend to be payable only in money.

Sec. 1. Subject to the provisions of this Act, EVERY STIPEND WHICH IN ANY WAY OR TO ANY EXTENT DEPENDS UPON FLUCTUATIONS IN THE PRICE OF VICTUAL (hereinafter in this Act referred to as “VICTUAL STIPEND”) shall cease so to depend, and shall be pay-

able only in money at the standard value thereof as hereinafter defined.

The substitution of the standard value of a victual stipend for the value thereof according to the present law and practice is hereinafter in this Act referred to as the "standardisation" of the stipend, and the expressions "standardised" and "date of standardisation" have corresponding meanings.

It will be observed that this section applies to "every stipend which in any way or to any extent depends on fluctuations in the price of victual." So that, although Part I. of the Act (in which the section occurs) is in the main directed only to the case of old *quoad omnia* parishes having a victual stipend payable out of teinds, its provisions may incidentally affect the case of other parishes such as the burgh churches and even some *quoad sacra* parishes, to the extent to which the income of the endowments of these out of which stipend is payable may be of a nature depending on fluctuations in the price of victual.

Stipend of this nature is to be reduced to a standard value in money which is to be arrived at in manner prescribed in sec. 2, the provisions of which are as follows:—

2.—(1) The value in money of victual stipend shall for each county in Scotland be determined by adding to the former county average value of the different kinds of victual in which such stipends are localised an increase of five per centum of that average value, and for the purposes of this section the former county average value of any kind of victual shall be deemed to be the average value of that kind of victual for that county for the fifty years 1873 to 1922, as ascertained—

Ascertainment of "standard value" of victual stipend.

- (a) In the case of the kinds of victual mentioned in the First Schedule to this Act, by reference to the values set out therein, or

where for any county the value of any such kind of victual is not so set out, then by reference to the value of such other kind of victual for that county or to the value of the same kind of victual for such other county or counties as the Court of Session may select,¹³ and by Act of Sederunt prescribe, as being most suitable in the circumstances of the case; and

- (b) In the case of any kind of victual not mentioned in the First Schedule to this Act, in accordance with the provisions set out in the Second Schedule to this Act.

The Schedules are printed in the Appendix (pp. 581-583). An Act of Sederunt relative to sec. 2, sub-sec. (1) (a) was passed on 16th July, 1925, which will be found in Appendix III., at p. 601.

(2) In the application of the foregoing provisions of this section to a particular parish, regard shall be had to any special method of calculation of stipend customary in that parish (including calculation of a stipend localised in Bear by reference to the fiars price for first or second Barley) and the sheriff may give such instructions to the Clerk of Teinds as he may deem to be necessary or proper for this purpose upon application made to him by any minister or presbytery or heritor concerned at any time before the expiry of six months after the date of standardisation. If no such application is then made in respect of any parish, this sub-section shall not have effect with respect to that parish. Intimation of any such application shall be made to such persons as the sheriff may appoint. The decision of the sheriff shall be final unless an appeal therefrom shall be taken to the Lord Ordinary by the applicant or by

¹³ See *Minister of Cumbernauld, &c.*, 1920 S.C. 625, *supra*, pp. 399, &c., for procedure in such cases in estimating stipend apart from standardisation proceedings.

any person appearing in the application in manner provided by the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868, with respect to appeals from the sheriff to the Lord Ordinary under that Act, and the provisions of that Act relating to such appeals shall, with the necessary modifications, apply to appeals under this sub-section, and the clerk to the process in appeals under this sub-section shall be the Clerk of Teinds.

It will be observed that under sec. 2 (1) (b) and Schedule II. (Appendix, p. 583) provision is made for the case of stipend payable in victual of a kind not mentioned in Schedule I. Where the value of the particular kind of victual is given in the official returns of fiars prices, the "former county average value" falls to be fixed by the Clerk of Teinds under Part A of Schedule II. But where the value is not so given, provision is made for recourse to the Sheriff on the application of (a) the minister concerned, (b) the clerk of the Presbytery where the benefice is vacant, or (c) any heritor concerned. The procedure in this case is laid down in Part B of Schedule II. (Appendix, p. 583). So, too, under sub-sec. (2), upon a similar application the Sheriff may give to the Clerk of Teinds such instructions as he may deem necessary or proper in cases where any special method of calculation (including calculation of a stipend localled in BEAR by reference to the fiars prices for first or second barley) has been customary in any parish, in manner and to the effect set out in the sub-section.¹⁴

¹⁴ The provisions of this sub-section have already been resorted to in various instances with marked benefit to the parish concerned. *E.g.*, in an application at the instance of *The Presbytery of Aberdeen, Petitioners*, Sept., 1926 (unreported), Sheriff Laing granted the prayer of the Presbytery that part of the standardised stipend for the second charge of Old Machar, falling to be determined by the price of localled bere, should be determined by the fiars prices of first quality barley, as fixed in the county of Aberdeen. This meant an increase of about 67 shillings a quarter on that part of the standardised stipend over what it would have been but for the operation of the sub-section.

Competence
of procedure
by single
application
for several
parishes.

Obviously there may in any particular county be a number of parishes in which such a special method of calculation has prevailed, or in which stipend is payable in a kind of victual which is not included in the returns of fiars prices. And it would have been convenient had it been possible to include a number of similar cases in one application, especially as the expense of an application may sometimes be disproportionate to the amount at stake in the former class of case. But the scheme of the Act seems to require consideration of the circumstances of the "particular parish" at the time when standardisation comes to be effected. So that, although in practice it is unlikely that a special method of calculation which has become customary will be altered, yet, strictly speaking, the circumstances at the date when the case becomes ripe for standardisation must be regarded. So that the provisions of the Act do not seem to permit of a general application covering all the cases in the county which may require to be dealt with. If, however, in any particular year a number of parishes in a Presbytery should be ripe for standardisation owing to vacancies (actual or constructive) having occurred, there seems no reason why the Presbytery should not present a single application craving the Sheriff to find the prevalence of the particular custom established in regard to each of the parishes specified.

"Standard
value"
defined.

By sec. 2 (3) it is provided that the value in money of any victual stipend, as the same may be determined under sub-section (1) of the section subject to any variation under sub-section (2) thereof, along with the value of any money stipend is in the Act referred to as the "standard value" of that stipend.

Date of
standardi-
sation of
stipend.

The following section (3) provides for the date when this "standard value" shall become operative and has to be fixed—this date being in the Act after-

wards referred to as the "date of standardisation." The section is as follows:—

3. The DATE OF STANDARDISATION of a stipend shall be the term of Martinmas which shall first occur not less than six months after the date when the benefice BECOMES ACTUALLY VACANT or is deemed to have become vacant by election or by notification as hereinafter provided. In the case of a benefice which is actually vacant at the passing of this Act the date of standardisation shall be the term of Martinmas, nineteen hundred and twenty-five.

The words "becomes actually vacant" shall not include the occasion where a minister is succeeded by an assistant and successor APPOINTED to him BEFORE the passing of this Act, but shall include the occasion where a minister is succeeded by an assistant and successor APPOINTED to him AFTER such passing.

Meaning of
"appointed"
in relation to
an assistant
and successor.

In the application of the latter part of this section it will be observed that the test of its applicability to the case where the minister in office at the passing of the Act is succeeded by an assistant and successor is whether that assistant and successor has been "appointed" before or after the passing of the Act. In the former case the parish does not "become actually vacant" on the succession; in the latter it does. In the interpretation of this provision a question suggests itself as to the meaning of "appointment." Does it mean the election and call of the assistant and successor followed by the sustaining of the call by the Presbytery, or the completed admission to the charge, generally known as induction? Used as the expression is in an Act of Parliament, it is legitimate to consider the sense in which the same expression is used in prior Acts dealing with the same or similar subject-matter. Now in the Church Patronage Act, 1874, there is a clear distinction drawn in sec. 3 between "APPOINTMENT" on the one hand and "ADMISSION AND SETTLEMENT" of the minister "appointed" on the other; and the distinction is

Cf. *supra*, pp.
371 and 372.

37 & 38 Vict.
c. 82.

also met with in other sections of this Act. (See especially the definition section, sec. 9, under which "minister" is defined to include "assistant and successor.") The Act of 1874 governs the ELECTION AND APPOINTMENT of ministers in all *quoad omnia* parishes; and the word "APPOINTMENT" occurring in the Act of 1925 must, it is thought, be there read in the absence of clear indication to the contrary in the sense already attached to it by the Legislature. It would, therefore, seem that to exclude a parish from becoming a subject of standardisation in the case provided for (otherwise than by election or notification—as to which see *infra*)—it is sufficient that the assistant and successor has been "APPOINTED" (*i.e.*, ELECTED, CALLED, AND THE CALL SUSTAINED by the Presbytery) prior to the passing of the Act, although his formal ADMISSION TO THE BENEFICE by the ceremony popularly known as INDUCTION may not have been carried through until a later date. This, too, seems to be consistent with the statement of the law by Lord President Inglis in the case of *Hastie*, 16 R. 715, at pp. 727, 729, 730, and 731. On p. 731 he is reported as saying, with reference to what is popularly spoken of as "induction," that "What follows" (on ordination) "is not a ceremony at all, but merely a recognition of the new minister as a member of Presbytery in his capacity as minister of the benefice to WHICH HE HAS BEEN PRESENTED OR ELECTED."

Standardi-
sation by
election.

While normally the date of standardisation is by sec. 3 deferred (except in parishes vacant at the passing of the Act) until the first term of Martinmas occurring at least six months after a vacancy subsequent to the passing of the Act, standardisation may nevertheless be accelerated for all purposes by the "ELECTION" of the minister in office, or for certain purposes by "NOTIFICATION" by the General Trustees. Dealing meanwhile with the former, the election, where an assistant and successor is in office, may competently be made either by the minister with consent

of the assistant and successor or by the assistant and successor with consent of the minister or authority of the Presbytery. The provisions governing STANDARDISATION BY ELECTION are contained in sec. 4 which reads—

Any minister who at the passing of this Act is entitled to a victual stipend may elect that the stipend shall be standardised, and if he so elects he shall intimate his election in writing in the form set forth in the Third Schedule to this Act or in a similar form to the heritors to the clerk of the Presbytery and to the General Trustees, and in such case the benefice shall for the purposes of this Act be deemed to have become vacant by election at the date of the said intimation.

Where at the passing of this Act an assistant and successor has been appointed to a minister entitled to a victual stipend, either the minister or the assistant and successor with the consent of the assistant and successor or of the minister (as the case may be), or failing such consent with the authority of the Presbytery, may elect and intimate his election as aforesaid.

While it is only upon the occurrence of a vacancy in the benefice, or by election by the incumbent holding the benefice for the time as just explained, that standardisation can become fully operative, provision is made in sec. 5 whereby the General Trustees can, if they so desire, accelerate standardisation, so that it will become operative for all purposes except the regulation of the rights of the existing minister (including, in appropriate cases, those of his assistant and successor appointed prior to the passing of the Act)—these rights, unless and until the minister elects otherwise, being conserved to him. The general result is that in any question between the heritors and the Church as represented by the General Trustees, standardisation is operative just as fully as in the normal case; but the General Trustees, while receiving

Standardi-
sation by
notification.

Standardi-
sation by
notification
by the
General
Trustees; its
nature and
effect.

from those liable in payment only the standardised stipend, must undertake to secure to the existing incumbent that his stipend shall be paid to him according to the hitherto existing law and practice, and that the right (if any) of his widow and representatives to ANN shall also be satisfied by the General Trustees. (In the case of an assistant and successor appointed even before the passing of the Act, no right to ANN exists.) The text of the provisions is as follows:—

5.—(1) It shall be lawful for the General Trustees to intimate in writing to the minister of any parish who is entitled to victual stipend and to the clerk of the Presbytery and to the heritors that the victual stipend is to be standardised and in such case the benefice shall for the purposes of this Act, but subject as hereinafter in this section provided, be deemed to have become VACANT BY NOTIFICATION at the date of the said intimation: Provided that the General Trustees before making such intimation shall have given to the minister an undertaking that (notwithstanding such standardisation) the amount of his stipend according to the present law and practice will continue to be paid to him by the General Trustees until he ceases to be minister of the parish and that the right (if any) of his widow or other representatives to ann will, in the event of his death, be satisfied, and the obligations contained in any such undertaking shall be duly fulfilled by the General Trustees, who shall be indemnified by the General Assembly to such extent (if any) as may be necessary having regard to the amount of money at the disposal of the Trustees for that purpose: Provided always that if at any time during the currency of such an undertaking the minister intimates to the General Trustees in terms of the section of this Act relating to standardisation by election, his election that his stipend should be standardised, such intimation shall have effect as in that sec-

tion provided and the undertaking shall cease to operate.

(2) In the application of the foregoing sub-section to a benefice where an assistant and successor has been APPOINTED to the minister before the passing of this Act, the word "minister" shall include and refer to that assistant and successor as well as the minister: Provided that the undertaking to be given by the General Trustees to the assistant and successor shall include his interest in the stipend so long as he remains assistant and successor as well as after he succeeds the minister should that event occur, but shall not include any right with respect to ann.

Special provision is made for a COLLEGIATE parish in which separate benefices exist and both the ministers thereof are entitled to a virtual stipend, the terms of these being—

Standardi-
sation in case
of collegiate
charges.

6. With respect to a parish where separate benefices exist and both the ministers are entitled to virtual stipend, except where in such parish there are no surplus teinds, the foregoing provisions of this Act shall have effect subject to the following modification, namely, that neither of the benefices shall be deemed to be or to become actually vacant or to have become vacant by election or notification, unless the other benefice was actually vacant at the passing of this Act, or shall thereafter have become actually vacant or been deemed to have become vacant by election or notification.

The effect of this section is that in any parish IN WHICH THERE ARE SEPARATE BENEFICES both of which are full at the date of passing of the Act, and in which (a) BOTH MINISTERS ARE ENTITLED TO VIRTUAL STIPEND, and (b) SURPLUS TEINDS EXIST, neither by occurrence of an actual vacancy, nor constructively by election or notification, is one benefice held to become vacant until the other benefice also becomes vacant, either actually or constructively

Discussion of
effect of pro-
visions.

by election or notification. Accordingly, in the case of vacation, *e.g.*, by death, of, say, the first charge of such a parish, the new minister would still, it would appear, draw his stipend on the former basis of an ascertainment by fiars prices just as would the incumbent of the other charge. And this state of things will continue until an actual vacancy occurs in the second charge unless, through the action of the minister of that charge by election or of the General Trustees by notification, a vacancy in the second charge is constructively created. But on a vacancy occurring or being deemed to occur in that charge, then both benefices will become subject to standardisation as at the first term of Martinmas occurring not less than six months after its date. If although there are separate benefices only one minister is entitled to victual stipend, then the general provisions hereinbefore set out apply to his stipend notwithstanding the existence of the other benefice; and similarly, if there are no surplus teinds, the general provisions apply although both ministers may be entitled to victual stipend. The marginal note defines the section as affecting "COLLEGIATE CHARGES"; and it would seem to apply to all such charges in which both ministers are entitled to victual stipend IF PAYABLE OUT OF TEINDS. This qualification seems to be implied in the reference to the existence of surplus teinds.

Where no
separate
locality.

Instances may occur in which there is NO SEPARATE LOCALITY for the two ministers of a parish, but in which, notwithstanding this, each minister enjoys a benefice. It is the vacation of the "benefice," not of the parish, which is dealt with in sec. 6. As in collegiate charges in which there are no surplus teinds the occurrence of a vacancy in either charge is an occasion for standardisation irrespective of the condition of the other charge, it may be that the stipend of one minister becomes standardised, while that of the other is still payable in victual on the

basis of fiars prices. In the case figured of a collegiate charge in which there is not a separate locality for each minister, this may involve the anomaly of the victual stipend having to be calculated on the fiars prices and the proportion effecting to the charge which has not yet been standardised being paid on this basis, while that payable to the General Trustees for the other charge will be simply the money payment as standardised.

An important change upon the rules hitherto prevalent as to the VESTING OF STIPEND in the minister is made by sec. 7 of the Act, which provides thus—

Vesting of
standardised
stipend.

Any stipend which has been standardised under the provisions of this Act shall AS ON AND FROM THE DATE OF STANDARDISATION VEST *de die in diem* in the minister entitled thereto without prejudice to the payment of any stipend vested in him or in any former incumbent of the benefice according to the present law and practice and subject to the satisfaction of any claim for ann on the part of the widow or other representatives of a deceased incumbent: Provided that in the case of a benefice which is deemed to have become vacant BY NOTIFICATION the foregoing provision shall not have effect unless and until the benefice becomes actually vacant or is deemed to have become vacant by election.

These provisions govern the rights of an outgoing minister or his representatives and an incoming minister respectively to receive payment of the standardised stipend from those responsible to them in payment, *i.e.*, the General Trustees, to whom all standardised stipend is in the first instance payable by those liable for it, and by whom it is in turn payable to those entitled to receive it. The proviso at the end of the section is, of course, rendered necessary, because in the case of standardisation by notification the rights

Effect of the
provisions as
to vesting.

of the incumbent are not affected for better or for worse by the standardisation until a vacancy, actual, or constructive by election, occurs—these rights being secured to him as above explained by the guarantee of the General Trustees, who receive the standard value from those liable in payment thereof.

Payment of
standardised
stipend.

As regards actual PAYMENT by those by whom this is due, the effect of standardisation is that from its date the standardised stipend becomes payable by the heritor liable to the General Trustees, and so continues payable and recoverable as stipend is at present until the standard value of the stipend has been constituted a real burden on the land or has been redeemed or extinguished under the appropriate provisions of the Act. The following are the provisions which deal with PAYMENT:—

8.—(1) As from the date of standardisation any stipend which has been standardised under the provisions of this Act shall be payable by the heritors to the General Trustees half-yearly at the terms of Whitsunday and Martinmas each half-yearly payment being in respect of the half-year preceding the date of payment subject to the following exceptions, namely—

- (a) that the first half of the standardised stipend for the year beginning on the date of standardisation shall not become payable until the term of Lammas in that year; and
- (b) that the second half of the standardised stipend for that year shall not become payable till the term of Candlemas in the following year.

(2) Where as hereinafter in this Act provided the standard value of the stipend as shown by the teind roll is constituted a real burden or has been redeemed or extinguished as the case may be, the provisions of this section shall cease to have effect, and with respect to payments under this section due or payable

before that event, the General Trustees shall have all the powers of recovery which according to the present law and practice a minister has with respect to his stipend. (Cf. sec. 12 (2), *infra*, p. 437.)

The effect of these provisions seems to be as follows:—In the year in which the term of Martinmas Effect of provisions.

which is the date of standardisation occurs, a stipend for the crop and year has already accrued to the party in right of it at the previous Whitsunday and Michaelmas respectively. Payment of this becomes exigible in normal course only when the fiars prices are fixed in or about the following February, and falls to be made, not to the General Trustees, but to the party or parties to whom it would be payable under the law as hitherto existing. AS FROM THE DATE OF STANDARDISATION the standardised payment begins to accrue; and when the scheme of the provisions has become fully operative the payment for six months from Martinmas to Whitsunday will be due and payable at each Whitsunday term, and the payment for the next six months at each Martinmas term.

But in the first year after standardisation the payment accruing for the six months from Martinmas to Whitsunday is not to be PAYABLE until Lammas (1st August); and the second payment, that accruing for the six months from Whitsunday to Martinmas, is not to be PAYABLE until Candlemas (2nd February) in the next year. In the meantime, however, there is ACCRUING the payment for the six months from the terms of Martinmas occurring a year after the date of standardisation to the following Whitsunday, which becomes due and payable at that term. In the second calendar year after the date of standardisation there will therefore be a six months' standardised stipend payable at Candlemas and another at Whitsunday, the succeeding payments becoming due at each term of Martinmas and Whitsunday thereafter.¹⁵

¹⁵ For an example of the working out of this with reference to a particular year, see *supra*, Chapter II., pp. 99-100.

As regards VESTING of the half-year's standardised stipend for the first half-year after standardisation (which is payable at the following Lammas), this is to be *de die in diem as qn and from* the date of standardisation. And accordingly in the case of a minister who resigns or is removed from the benefice, or who dies during the period between this date (Martinmas) and the following Whitsunday, the proportion of the stipend payment falling due at Lammas will be determined by the number of days for which he shall have held the benefice from that term—no account being taken of the period from the preceding Michaelmas (which would be the last date of vesting under the old law) to Martinmas. It follows that a minister whose tenure of office terminates between Michaelmas and the date of standardisation will have no claim to share (himself or through his representatives) in the stipend becoming payable at Lammas. Any hardship in this is, however, only apparent, not real; as under the former law no right to the stipend for the first half of the crop and year would have vested in him unless he had survived Whitsunday.

Conversion by commutation or redemption of standard charge; and extinction in certain cases.

The objects of the Act would have been but very imperfectly attained by the mere conversion of the fluctuating victual stipend into a permanent standard charge. For the purposes in view it was necessary to make provision for permitting, and so far as possible for requiring, COMMUTATION OR REDEMPTION OF THE STIPEND.

The following are the provisions directed to accomplishing this end. In the first place, provision is made by sec. 11 for the preparation of a TEIND ROLL for every parish (*quoad omnia*) in Scotland, in the following terms:—

Preparation of teind rolls.

11.—(1) There shall be prepared by the Clerk of Teinds FOR EVERY PARISH IN SCOTLAND a TEIND ROLL specifying in sterling money—

(a) The total teind of that parish; and

- (b) The amount of that total applicable to the lands of each heritor; and
- (c) The value of the whole stipend payable to the minister, so far as payable out of teinds including vicarage teinds payable as stipend and surrendered teinds so payable; and
- (d) The proportion of that value payable by each heritor in the parish.

(2) The said teind rolls shall be PREPARED AND ISSUED AS SOON AS MAY BE PRACTICABLE, and the provisions of the Fifth Schedule to this Act shall have effect with respect to the preparation, issue, and adjustment of the teind rolls.

(3) The Court of Session shall make by Act of Sederunt, with the approval of the Treasury, such rules and regulations as may in the judgment of the Court from time to time be necessary to regulate the amount of the fees to be paid to the Clerk of Teinds in connection with the preparation, issue, and adjustment of the teind rolls and the time and place of the payment of the said fees. The expenses of the preparation, issue, and adjustment of the teind roll, including where a state of teinds is necessary the expense of the preparation thereof, shall be apportioned among the heritors (including any heritors whose teinds have been valued and surrendered before the date of standardisation) in proportion to the amount of the total teind applicable to the lands of each heritor. The share of such expenses apportioned to any heritor, other than a heritor whose teinds have been valued and surrendered as aforesaid shall be payable by such heritor, and the share of such expenses apportioned to any heritor whose teinds have been valued and surrendered as aforesaid shall be payable by the General Trustees.

The occasion for the preparation of a teind roll for any particular benefice arises (Sched. Fifth) when the benefice is either actually vacant at the passing of the Act, or when it becomes vacant thereafter,

When
occasion for
preparation
of teind roll
arises.

actually, or constructively by election or notification. It then becomes the duty (a) of THE CLERK OF THE PRESBYTERY FORTHWITH TO INTIMATE the vacancy to the Clerk of Teinds, who shall communicate the intimation to any titular who has previously notified the Clerk of Teinds in writing that he desires to receive such intimation; and (b) OF THE HERITORS concerned forthwith to prepare and lodge in the Teind Office a state of teinds unless the Lord Ordinary shall, on the application of any party, dispense therewith. Details of the subsequent procedure are set out in the Fifth Schedule to the Act, which will be found printed in the Appendix, p. 585.

Under sec. 11 of the Act the Court of Session is directed to make by Act of Sederunt, with the approval of the Treasury, such regulations as may in the judgment of the Court from time to time be necessary to regulate the amount of the fees to be paid to the Clerk of Teinds in connection with the preparation, issue, and adjustment of the teind rolls and the time and place of the payment of these fees; and by article 9 of the Fifth Schedule the Court is directed to make such rules and regulations as may in their judgment from time to time be necessary with respect to the preparation, reporting, adjustment, disposal, and custody of the teind roll. An Act of Sederunt under this article was issued dated 25th October, 1925. This is printed in Appendix III., *infra*, pp. 613, &c.

Position
where aug-
mentation
possible but
not yet due
when vacancy
occurs.

Article 8 of the Fifth Schedule provides that the roll, as and from the date of interlocutor of the Lord Ordinary declaring it to be final, shall be for the purposes of the Act final subject to such alterations and adjustments as may be necessary in consequence of changes of ownership or in consequence of redemption. As this saving clause does not seem to leave room for alteration arising in consequence of AUGMENTATION, a difficulty may arise in case of a vacancy occurring in a benefice in which there is room for an augmentation under sec. 10 of the Act,

but in which the period at which it is competent to apply for this has not yet arrived. In such a case the appropriate course would seem to be for the Lord Ordinary to hold over his interlocutor declaring the roll to be final until the augmentation proceedings have been disposed of; but the terms of article 8 of the Schedule suggest doubt as to the competency of this. Probably, however, the matter is one connected with the "PREPARATION" or "ADJUSTMENT" of the roll, which may fittingly be dealt with by Act of Sederunt under article 9 of the Fifth Schedule; but it does not appear to be provided for in that of 25th October, 1925.

ON THE TEIND ROLL BECOMING AVAILABLE, the following provision for substituting A CHARGE for liability for stipend and for REDEMPTION THEREOF become operative, viz.:—

Charge to be substituted for liability for stipend exceeding one pound.

12. Where the STANDARD VALUE (as shown by the teind roll of a parish) of the stipend exigible from the teinds of any lands of a heritor in that parish which are comprised in one entry in the teind roll EXCEEDS THE SUM OF ONE POUND—

- (1) the amount of such standard value shall by virtue of this Act be constituted as at and from the first term of Whitsunday or Martinmas which shall occur after the date when the teind roll becomes final a REAL BURDEN (in this Act referred to as the "STANDARD CHARGE") on the lands from the teinds of which the said stipend is exigible in favour of the General Trustees preferable to all other securities or burdens not incidents of tenure;
- (2) the amount of the STANDARD CHARGE shall be payable by equal half-yearly instalments at the terms of Whitsunday and Martinmas each half-yearly instalment being in

respect of the half-year preceding the date of payment and the said instalments shall be RECOVERABLE BY THE SAME MEANS AND IN THE LIKE MANNER AS ANY FEU-DUTY OUT OF THE SAID LANDS WOULD BE RECOVERABLE (cf. *supra*, p. 432).

Redemption of standard charge.

- (3) THE STANDARD CHARGE over any lands MAY at any time after the completion of the teind roll BE REDEEMED by and IN THE OPTION OF THE HERITOR of those lands OR OTHER PERSON LIABLE IN RESPECT OF THE STANDARD CHARGE either (a) for such consideration or in such manner as may be agreed upon between the person liable and the General Trustees, or (b) at any term of Whitsunday or Martinmas after three months' notice EITHER (i) by payment to the Trustees of such a sum as would if invested at the time of payment in Consolidated $2\frac{1}{2}$ per cent. annuities produce an annual sum equal to the standard charge, or (ii) by transfer to the General Trustees of such an amount of Consolidated $2\frac{1}{2}$ per cent. annuities as would produce an annual sum equal to the standard charge;

Extinction of charge on redemption.

- (4) UPON THE REDEMPTION of the standard charge as aforesaid any claim upon the heritor or other person in respect of such standard charge shall cease and be extinguished and the lands from which the same was exigible shall be disburdened thereof in all time coming and an entry to that effect shall be made in the teind roll which shall be sufficient evidence of the discharge of the burden.

Allocation of standard charge on division of lands.

13. A STANDARD CHARGE SHALL from its constitution CONTINUE A REAL BURDEN on the whole of the lands subject thereto, and on every part of those lands notwithstanding any disposition of the lands or any part

thereof unless and UNTIL INTIMATION OF AN ALLOCATION of the standard charge has been made in writing by the General Trustees and the disponent or his representatives to the Clerk of Teinds, who upon receiving such an intimation shall forthwith make the necessary entry in the teind roll.

If as the result of any such allocation the portion of a standard charge so allocated upon the lands disponent or remaining a real burden on the lands retained by the disponent does not exceed one pound, the disponent or his representatives shall within three months after the date of the entry in the roll redeem the same by payment to the General Trustees of a sum equal to the amount so allocated or remaining a burden multiplied by twenty; and if the portion of the standard charge so allocated or remaining a burden exceeds one pound but is less than fifteen pounds, that portion of the standard charge shall as from the date of the entry in the teind roll be increased by five per centum.

Redemption of allocated portion not exceeding £1.

Increase by 5 per cent. where remainder between £1 and £15.

A different line of treatment has been adopted in the Act with reference to cases in which the standard value of the stipend exigible from the lands of any heritor in a parish which are comprised in one entry in the teind roll does not exceed the sum of £1. In dealing with such small sums, the amount required for redemption is not so large as to involve any hardship in compulsory redemption; and accordingly—except in the cases of the very small sums as regards which liability is entirely extinguished, as presently explained—the heritor or other person liable in payment of the stipend is required to redeem the same under sec. 14, which is in the following terms:—

Provisions where stipend does not exceed £1.

14. Subject to the provisions of the next succeeding section of this Act, where the standard value (as

shown by the teind roll of a parish) of the stipend exigible from the teinds of any lands of a heritor in that parish which are comprised in any one entry in the teind roll does not exceed the sum of one pound—

(1) the heritor or other person liable in payment of the said stipend shall redeem the same either

(a) at the first term of Whitsunday or Martinmas which shall occur not less than three months after the date on which the teind roll of the parish becomes final for such consideration or in such manner as may be agreed upon between the persons so liable and the General Trustees; or

(b) by payment to the General Trustees at the said term of Whitsunday or Martinmas of a sum equal to the standard value of the said stipend multiplied by eighteen; or

(c) by payment to the General Trustees, along with each half-yearly payment of the said stipend during a period of eighteen years commencing at the said term of Whitsunday or Martinmas, of a redemption instalment equal to seventy-five per centum of the half-yearly payment of the stipend, which redemption instalment shall be recoverable by the General Trustees in the same manner as the half-yearly payment of the stipend:

Upon the redemption of a stipend as aforesaid any claim upon the heritor or other person in respect of such stipend shall cease and be extinguished and an entry to that effect made in the teind roll shall be sufficient evidence of the redemption.

Having regard to the wider objects to which the scheme of legislation of which the Property and Endowments Act formed part was directed, it was thought desirable to avoid such occasion for petty friction as might readily have been afforded by the compulsory commutation or redemption, or even by the frequent collection, of sums of an amount so trifling in each case as to be negligible, unless, indeed, in the case of a number of them being due by a single heritor in respect of various parcels of land. To accomplish this is the purpose of sec. 15, which is in the following terms:—

15. Where THE STANDARD VALUE (as shown by the teind roll of a parish) of the stipend exigible FROM THE TEINDS OF ALL THE LANDS OF A HERITOR in that parish, whether those lands are comprised in one or in more than one entry in the teind roll does NOT EXCEED THE SUM OF ONE SHILLING, any claim for or in respect of the stipend upon the heritor or other person liable in payment thereof (other than a claim for payments already due) shall, notwithstanding any law or practice to the contrary, cease and be extinguished as at the first term of Whitsunday or Martinmas which shall occur not less than three months after the date on which the teind roll of the parish becomes final.

As has been pointed out, the provisions making stipend which has hitherto been payable in victual, or according to the value of victual, to be payable for the future in money are not confined in their operation to the stipends payable out of teinds in parishes *quoad omnia*. The terms of sec. 1 are perfectly general that, subject to the provisions of the Act, “EVERY STIPEND which in any way OR TO ANY EXTENT depends upon fluctuations in the price of victual . . . shall cease so to depend, and shall be payable ONLY IN MONEY AT THE STANDARD VALUE THEREOF,” as in the Act thereafter defined. In-

Allocation of standard charge.
Extinction of liability for payments of stipend exigible from any heritor whose liability in respect of all lands belonging to him in the parish appears from the teind roll not to exceed one shilling of standard value.

Application of standardisation in the case of other benefices than those of parishes *quoad omnia*.

Application
of Part I. of
the Act to
parishes other
than *quoad
omnia*
parishes.

stances occur of stipend being payable in whole (or more commonly in part), in victual, or in terms of victual, in parishes other than those *quoad omnia*, in the case of certain burgh benefices, and also in some of the older *quoad sacra* parishes. In some cases such payments are charges upon teinds; in other cases they are not. So far as regards the ascertainment of the value of such stipends in money (standard value) is concerned, there seems to be no difficulty in applying the provisions of sec. 2 to this; and the same is true regarding the provisions of the sections dealing with the date of standardisation and with the vesting and payment of the stipend standardised. In the case of BURGH CHARGES the matter will fall appropriately to be dealt with in the orders to be made by the Commissioners under secs. 21 and 22; while in the case of parishes *quoad sacra*, it can easily be worked out by arrangement between the parties interested. But, looking to the part which a teind roll plays in the provisions for the creation of the standard charge and for commutation and redemption, there seems to be difficulty in applying these to the case of benefices where the victual stipend provided is not charged upon teinds appearing on such a roll. In the case of burgh charges in this position, sec. 22 (2) (c) and (d) (*supra*, pp. 152, &c.) would seem to enable the Commissioners to deal with these matters. But in the case of other such parishes (*e.g.*, *quoad sacra*) there seems to be no provision by which they can be dealt with otherwise than by private agreement among the parties interested. In most cases it will probably be found advantageous for them to come to a suitable agreement. If this should in any case be found to be impossible, the payment will continue to be exigible in terms of the existing obligation, with the substitution of the standard value for the fluctuating value based on victual prices. It may be observed that, as in any such case the obligation will

have originated under a comparatively modern contract, it is in principle indistinguishable from a voluntarily undertaken rent charge, and so is not open to the objections which in the eyes of some attach to the legal liability for stipend in the older parishes.

AUGMENTATION OF STIPEND UNDER THE ACT OF 1925.

As has been pointed out (*supra*, p. 404), upon the passing of the Property and Endowments Act the law hitherto governing AUGMENTATIONS OF STIPEND ceased to operate, without prejudice to any application for an augmentation which had competently been made before the passing of the Act or to anything following on such application or done therein (sec. 10 (1)). In place of the law thus superseded the Act contains the following provisions:—

10.—(1) On the passing of this Act the present law relating to augmentation of stipend shall cease to have effect without prejudice to any application for augmentation competently made before such passing or to anything following on such application or done therein. Who may apply?

(2) THE MINISTER OR THE GENERAL TRUSTEES as the case may be TO WHOM A STIPEND OR A STANDARDISED STIPEND IS PAYABLE MAY— When?

(a) if not less than twenty years shall have elapsed since the date of the last application for augmentation of the stipend; or

(b) upon the expiry of twenty years from the date of the last application for augmentation of the stipend or upon the expiry of ten years from the passing of this Act, whichever of these two events shall first occur;

apply to the Lord Ordinary to find whether there are surplus teinds available for an augmentation. No SUCH APPLICATION MAY BE MADE AFTER THE EXPIRY OF ELEVEN YEARS FROM THE PASSING OF THIS ACT.

Where
surplus teinds
available
augmentation
follows as of
right.

(3) If the Lord Ordinary (whose decision shall be final and not subject to review) finds that there are surplus teinds so available, the minister or the General Trustees, as the case may be, shall be entitled to receive as from the first term of Martinmas following the date of the application an augmentation according to the following scale:—

Amount of
augmentation
under the
Act.

- (a) Where the stipend as last modified by the Court of Teinds does not exceed twenty-five chalders, an augmentation of six chalders; and
- (b) Where the stipend as so modified exceeds twenty-five chalders but is less than thirty chalders, an augmentation of five chalders; and
- (c) Where the stipend as so modified is thirty chalders or upwards, an augmentation of four chalders.

The foregoing augmentation of six, five or four chalders, as the case may be, shall be CONVERTED AND LOCALLED IN STERLING MONEY according to the standard value, the order of allocation being in accordance with the present practice.

Limitation to
amount of
surplus teinds
actually
available.

If the amount of the available surplus teinds as ultimately ascertained in the localling of the augmentation among the heritors is insufficient to meet the foregoing augmentations, the augmentation shall be limited to the amount so ascertained.

(4) As from the date when a minister or the General Trustees, as the case may be, becomes or become entitled to an augmentation under this section, the amount of the augmentation shall be added to the stipend and shall be payable and recoverable in like manner.

(5) The provisions set out in the Fourth Schedule to this Act shall have effect with respect to augmentations under this section and any decree of locality following thereon.

The following are the provisions of the Schedule referred to:—

FOURTH SCHEDULE.

PROVISIONS RELATING TO AUGMENTATION OF STIPEND.

1. In ascertaining the amount of the available teinds the victual teind and stipend shall be converted according to the average of the fiars prices for the five years preceding the year in which an application is made:

Basis for
ascertaining
whether
surplus
teinds.

Provided that—

- (a) if in the case of victual teind that average is less than the value as determined in accordance with paragraph 3 of the Fifth Schedule to this Act (see *infra*), the victual teind shall be converted in accordance with that paragraph; and
- (b) if in the case of victual stipend that average is less than the standard value, the victual stipend shall be converted according to the standard value.

2. Any application to the Lord Ordinary, and the localling of any augmentation, and any decree of locality following thereon shall, subject to the provisions of this Act, be made and dealt with in such manner as the Court of Session by Act of Sederunt may prescribe.

Paragraph 3 of the Fifth Schedule is in the following terms:—

3. For the purposes of teind rolls, the value in sterling money of teind value in victual shall be determined—

- (a) Where a basis of conversion has been specified in the decree of valuation by reference to that basis; and
- (b) In any other case, by reference to the former

county average value within the meaning of sec. 2 of this Act. (Cf. *ante*, p. 421.)

An Act of Sederunt under sec. 2 of this Schedule was passed on 17th July, 1925, the terms of which will be found in the Appendix at p. 602. (See also A.S. of 15th July, 1925, 'Appendix III., p. 612.)

Sec. 10 of the Act proceeds—

(6) An augmentation under this section shall come in place of all future rights of augmentation and shall be final.

(7) In the event of the Lord Ordinary finding that there are no surplus teinds available for an augmentation, neither the minister nor the General Trustees shall be entitled to make any further application.

Application
to collegiate
charges.

(8) In the application of this section to a parish where separate benefices exist and both ministers are entitled to victual stipend—

(a) the expression “ the date of the last application for augmentation of the stipend ” shall, in cases where applications for augmentation were last made at different dates, mean the later of those dates; and

(b) the expression “ the stipend as last modified by the Court of Teinds ” shall mean the stipend of each or either of the two beneficiaries taken separately.

ANN.

ANN, a payment to the executors of a minister dying while he serves a cure, probably derived through Low Latin *annata*, from *annas*, a year.

Nature of
ann.

ANN has many peculiarities; it is neither heritable nor moveable succession of the deceasing minister to whose representatives it may be payable. It is a gift of the State; it is never *in bonis defuncti*; and it does not require any formal title on the part of the recipients.

The Act 1571, c. 41, provided that ecclesiastics ^{History of ann.} who died fighting against the King's enemies and their nearest-of-kin should have among other privileges not only the ann, but also the next presentation to the benefice.

The following is the text of the Act:—

Anent Kirkmen, that happinis to be slane in our
Soverane Lordis service in defence of his
hienes autoritie.

Our Soveraine Lord, with advise of his Regents Grace, the three Estates, and hail body of this present Parliament, hes statute and ordained, that in case ony our Soveraine Lordes trew lieges, beneficed men, happinis to be hurt, slane or woundis to the deid, and thereaftir of the saidis hurtis or woundis to de [die] in our Soveraine Lordes service and in defence of his autoritie, at ony time, against the forfaitit and declared Traytouris, presently being within the castell and burgh of Edinburgh, and uthers his Majesties oppin and manifest enemies, resistaris [resisters] and conspiratours against his hienes autoritie, during all the tyme of the oppin and manifest resistance thereto, that the narrest [nearest] of the said beneficed mannes kin, able and qualifit, sall haif the presentation, provisioun and callatioun of his benefice, for that tyme alanerlie, and the samin to be disponit to the nearest of his kin, that happenis to be slane or decease, in maner foirsaid, being alwais abil and qualifit therefor, as said is. And the profitts of thair benefices, with the fructes specialie on the grund with the annet theirafter to pertaine to thame, and their executors, als weil Abbottes, Priores, as all uther Kirkmen. (Thomson's "Acts of the Parliament of Scotland," vol. iii. (1814), p. 63.)

It will be seen that the whole Act had reference ^{Lord President Inglis' account of ann.} to temporary circumstances and to particular persons. Lord President Inglis in *Latta v. Edinburgh Ecclesiastical Commissioners*, 1877, 5 R. 266.

observed—"It would be of no profit, however, in this inquiry to go back beyond the Reformation."¹⁶ The whole regulation of the ann before the Reformation is so entirely different from what it has become in Protestant times that such an investigation is needless. All our institutional writers—Stair, Mackenzie, and Erskine, for example—are agreed that the law of ann was borrowed by us from Germany after the Reformation. But was the rule of law so adopted by us that settled rule which was set up by the Act of 1672 [see *infra*], or was there any settled rule at all? I hardly think there can be said to have been any settled rule. I have referred to some authorities on this point, and I find the rule thus stated by Carpzovius, one of the most learned ecclesiastical writers of Saxony (lib. i. tit. 12, definition 183)—'Ultra salarium, quod defunctus ecclesie minister promeruit, ex singulari beneficio viduæ ac liberis ejus etiam dimidius gratiæ annus hisce in provinciis assignatur.' The custom in Saxony then is, that the widow and his children receive half a year's salary of grace in addition to what the minister has earned for himself. A little lower down he states the motive for this—'Humanitatis nempe causa et pietas huic sanctioni causam dedit, quo etiam post mortem ministrorum verbi dei gratitudo et liberalitas erga ministerium demonstraretur, et hæredes defunctorum solatio quodam reficerentur.' We gather, therefore,

¹⁶ As to pre-Reformation practice, however, the following entry is instructive:—"Govane, 31st July, 1560, 11 a.m.—Mr. Alexander Betone, Archdeacon of Lothian, and one of the executors of q. Mr. James Betoun, rector of Govane, his brother, for himself and

Uchtirlony of that ilk, and Margaret Ogilwy lady Melgum, the other executors, came to the parish church of Govane, and there intimated and served a public instrument, under the sign and subscription manual of Mr. Hugh Lyndsay, notary public, dated at Melgum, 4 May, 1560, by virtue of which the said executors chose the surplus of the parsonage of Govane (*elegerunt superplus rectorie*), certain parishioners of Govane being there present; inhibiting them and the other parishioners from compounding with any other than with the said executors as regards the *annat* of the deceased rector; protesting that if they should do otherwise they should be answerable. Done in the church of Govane, &c." (Renwick's "Protocols of the Town Clerks of Glasgow," vol. v., p. 27).

that in the State of Saxony the grace allowed to the widow and children of a minister of God's Word was half a year's salary, and the motive for this was gratitude to the deceased minister. But this rule was not generally recognised in other parts of Germany. In Böhmer's '*Jus Eccles, Protestant,*' lib. iii. tit. 5, sec. 289, we find this stated—'*In ecclesiis Protestantium annus gratiæ in favorem viduæ et liberorum potissimum introductus, cum ministrorum ecclesiæ redditus non adeo solent esse pingues, ut viduæ et liberis suis sufficienter post mortem prospicere possint, inde humanitatis intuitu hoc lucrum adhuc iis indulgetur. Atque hæc lucra proprie gratiam continent, cum neutiquam intuitu anni carentiæ, his, quibus debentur, assignentur. Inde, in plurimis locis receptum est, ut tamdiu vacet ecclesia, quamdiu annus gratiæ durat, et interim ecclesia vacans vicinorum fiduciæ committatur.*' Now, here the general rule is declared to be to allow a year's grace for the widow and children, and in many places he says that to secure this the church is kept vacant for the year and the cure is served by a neighbour. The result is that in the country from which our rule was borrowed, there was no uniform practice, although there was a general rule adopted that after the incumbent's death some allowance should be made for his wife and family."

Sir George Mackenzie says, the German way of providing for widow and children was soon adopted here, and it seems almost certain that King James VI. wrote a letter on the subject to the General Assembly that met in Montrose in 1595. As at that time the question of how ministers' stipends were to be paid had not been settled, it may be observed that the king was giving advice to the General Assembly as to how the widows of the clergy should be provided for before he took any practical steps for ensuring that the husbands got any regular stipend when they were alive.

Post-Reformation
development
of ann.

The king's letter is lost, and we know not what it contained. The Assembly he addressed, however, passed this Act on 28th June, 1595—"Anent the Act made in favour of the executors of ministers, the Assembly and brethren foresaid for cleiring thereof declares, if the minister die after Michaelmas, *quia fruges separatæ sunt a' solo*, that his executors sall fall that yeir's rent and the half of the nixt." To what Act does this Protestant Assembly refer? The late Lord President Inglis in *Latta's* case, *supra*, at p. 271, pointed out that obviously it must be the Act 1571, intended for quite a different church and a clergy who would have no widows. Such things are, however, not strange to those who have made any study of the Reformation period. The sense of continuity was very strong in the Reformers, and the effect of the Reformation upon church law was much less than is frequently supposed. What happened next is not clear. We have seen that King James wrote one letter on ann which has disappeared. When he had long been king in England and had revisited Scotland to admire the reformed Episcopal Church which he thought he had permanently set up, the king wrote another letter about ann, apparently to his bishops, and the bishops made "an ordinance and act" in which was engrossed the king's letter, and which provided that, when a prelate died "before the Michaelmas and after the Whitsunday, that his relict and heirs shall have that year's profits and rents of the benefice, both the Whitsunday and Martinmas terms thereof that year, and nothing of the year subsequent; and if the prelate die after the Michaelmas, that his relict and heirs shall have right to the half of the profits and rents of the subsequent year beside and attour the whole rents of that year wherein he dies." Both the king's letter and the bishop's Act are lost. We only know of their existence from the case of *The Earl Marischal v. The Relict and Bairns of the Minister of Peterhead*, July 19, 1626, 1 Br. Supp. 36,

where the Court of Session gave judgment “ having seen and considered ” the bishop’s Act and the king’s letter. “ In a double pointing at the instance of the Earl Marischal, who was charged by the relict and bairns of the deceased minister of Peterhead, who was incumbent and served the cure, and who died before the feast of Michaelmas, anno 1623, and who was on the other part charged by the new entrant minister for the stipend of the year 1624; to the which stipend for the whole year the said entrant minister craved the only right, and alleged that he ought to be answered thereof for both the terms of Whitsunday and Martinmas that year, in respect he served the cure that whole year; and the relict and bairns of the deceased minister claiming right to the half of that year’s stipend, by reason of an Act and Statute of the Kirk, introduced in favour of the relicts and bairns of deceased prelates and ministers, which appoints the duties of the half of the profits of the prelacy and siclike of the stipend for the year subsequent next after the decease of the incumbent, to pertain to the relict and bairns of the said deceased incumbent, and the other half to pertain only to the entrant: The Lords having seen and considered an ordinance and Act made by the bishops which had relation to a letter of the deceased King James tending and written for that same effect, and which was engrossed in the said Act, and which Act was produced by the said entrant minister; by the which Act it was found that when the prelate dies before the Michaelmas, and after the Whitsunday, that his relict and heirs shall have that year’s profits and rents of the benefice, both the Whitsunday and Martinmas terms thereof that year, and nothing of the year subsequent; and if the prelate die after the Michaelmas, that his relict and heirs shall have right to the half of the profits and rents of the subsequent year beside, and attain the whole rents of that year when he dies,” the Court gave effect to the Act.

The position of the matter is remarkable, for, in the first place, one does not see what authority the bishops had to make the Act; in the second place, it apparently had reference only to a prelate's wife. As, however, the Court's judgment mentions that the bishops' Act made reference to "the like ordinance made before that Act in favour of ministers," it is possible that all the bishops did was to extend to themselves the provisions of the Act of Assembly of 1595.

Act of 23rd August, 1672 (Alexander's Abridgement, p. 291), foundation of modern law regulating ann.

The Act which became the guiding statute was passed on 23rd August, 1672 (1672, c. 13 [24]). It provides that, for the good of the Church, "a stated and equal course be taken for clearing and securing the ann due to the executors of deceased bishops, beneficed persons, and stipendiary ministers," viz., that "in all cases hereafter, the ann shall be an half-year's rent of the benefice or stipend over and above what is due to the defunct for his incumbency, which is now settled to be thus, viz., If the incumbent survive Whitsunday there shall belong to them, for their incumbency, the half of that year's stipend or benefice, and FOR THE ANN THE OTHER HALF: and if the incumbent survive Michaelmas, he shall have right to that whole year's rent for his incumbency, and FOR HIS ANN shall have THE HALF-YEAR'S RENT OF THE FOLLOWING YEAR; and that the executors shall have right hereto, without necessity or expenses of a confirmation."

Division (a) as between widow and children, (b) where neither widow nor children.

The case of *M'Dermet's Children*, 1747, Mor. 464, decided that as between widow and children ann is divided, one-half going to the widow, and the children receiving among them the other half. *Colvill v. The Lord Balmerino*, 1665, Mor. 466, decided that where there is neither wife nor children the annat belongs to the nearest of kin. In another case a minister who died had neither wife nor child, and being apparently not on good terms with his sister, his next-of-kin, he bequeathed his ann to his

brother's son. The sister contended that the ann "was not the defunct's, but being given in the time of Popery, when churchmen were neither allowed wives nor children, it belonged to the nearest of kin." The Court gave the sister the ann as next-of-kin, scarcely, it may be thought, because of her argument (*Alexander v. Cunningham*, 1686, Mor. 470). The most important decision of late years as to ann is that given in *Latta's* case above referred to, where the First Division held that the payments of stipend and of ann under the Act 1672, c. 13, were not affected by the Apportionment Act of 1870 (33 & 34 Vict. c. 35).

It was provided in an agreement between the parish minister of Penicuik and his assistant and successor that the former should "surrender" to the latter £165 of the annual income derivable from the benefice of said parish, payable half-yearly at Martinmas and Whitsunday. The minister died on 29th April, 1887, unmarried. The First Division of the Court of Session held that under the agreement the minister's executor was not bound to pay the assistant for his services between the previous Martinmas and that day, the stipend for the period being payable to the minister's next-of-kin as annat, and there having been no personal obligation upon him and his representatives to make any payment (*Dow v. Imrie* (Penicuik), 1887, 14 R. 928).

ANN is payable out of all stipends, whether paid in money or victual, and it was held to be exigible in town charges (*Shiels*, 1709, Mor. 466; *Hutchison*, 1747, Mor. 467). It followed from the principle that a parish *quoad sacra* is a benefice of the Church of Scotland (affirmed in a question as to the claim of the Widows' Fund in the case of *Cheyne v. Cooke and Others*, 1863, 1 M. 963), that the stipend of such a parish is subject to ann: and this result has been accepted and applied in practice since (cf. *Maclagan*, 1897 (unreported)).

ANN attaches
to all
stipends.

Parliament-
ary charges.

By 50 Geo. III. c. 84, executors or personal representatives of ministers whose stipends are augmented to £150 under the Act became entitled (sec. 16) to one half-yearly moiety of the augmentation to be so granted in name of ann, over and above the stipend due to the deceased minister in the same manner as in ordinary stipends, and the Barons of Exchequer were empowered to grant precepts for payment of this ann to those having right thereto, on their receipt without confirmation or making up any other titles. The Act 5 Geo. IV. c. 90, as to churches in the Highlands, provides (sec. 24) that the widow or nearest of kin of a minister of a church erected under the Act shall be entitled to the same payments as those of the parochial clergy.

Feu-duties
and rents
from glebe
lands.

Feu-duties and rents of glebe lands feued or leased under the Glebe Lands (Scotland) Act are subject to ann (29 & 30 Vict. c. 71, sec. 15), which provides that—The said feu-duties and rents and the interest of any moneys arising from the sale or sales of any part or parts of the glebe invested as hereinafter provided shall be taken payable to the minister and his successors in office serving the cure of the parish for the time, in all time thereafter, and be recoverable by him or them: provided that, *on the death of any minister*, his widow, heirs, and executors shall have right to and shall be entitled to receive and discharge *the said feu-duties and rents* in the same manner and for the same length of time as is provided by the thirteenth Act of the third session of the second Parliament of Charles the Second, passed at Edinburgh the 23rd day of August, 1672, intituled “Act for the ANN due to the Executors of Bishops and Ministers,” with regard to the stipend of the parish as ann.

Although interest on money invested as the proceeds of sale of the glebe is not expressly mentioned in the part of the clause providing for the application of moneys on the death of the minister, in *Fyfe*

v. *Thomson*, 1919 S.C. 380, interest on the invested price of a grassum on a lease of minerals was held to be subject to ann; and the same would probably be held with regard to interest on the invested price arising from a sale, which seems indistinguishable in principle from the other.

Ann is not included in the inventory of a deceased minister's estate for confirmation (Act 1672). Ann is given the minister "on such conditions that it can never form part of his executry estate; for it is never *in bonis* of the defunct; but that only enhances the value of the gift, for his widow and children will always have a claim to it preferable to the claims of his creditors" (Lord President Inglis, *Latta's* case, *supra*). In the event of a minister being survived by a son, and the children of a predeceasing son, it is thought that these children would have no right to share in the ann. The Intestate Moveable Succession Act, 1855, only affected moveable succession, and ann is neither heritable nor moveable, but a donation of the State at the expense of the incoming minister. In the opinion of the writers, therefore, there is no room for representation in ann, any more than there is in regard to the LEGITIM fund. Both are arbitrarily constituted by statute, and are subject to no latitude of application.

The history of ann is a remarkable illustration of the conservatism of lawyers and churchmen. The law which for two centuries has been administered for the benefit of Presbyterian ministers' widows originated in a provision for the next-of-kin of militant bishops of the pre-Reformation Church, and rests to some extent on supposed provisions for the widows of King James's post-Reformation prelates. But this venerable survival has at last reached the stage when it has had its day, and will soon "cease to be." For the Property and Endowments Act abolishes ANN, except in the case of widows and representatives of ministers already admitted before the passing of the

Ann is not confirmed to as part of executry.

Provisions of 1925 Act as to ANN.

Act to a benefice of the Church of Scotland. The provisions dealing with the subject are contained in sec. 9, and are as follows:—

Abolition of
ann for the
future.

9.—(1) Neither the widow nor any other representative of any minister ADMITTED AFTER THE PASSING OF THIS ACT to any benefice in the Church of Scotland shall be entitled to ANN.

(2) The foregoing provision shall, so far as respects any right in name of ann to any STIPEND STANDARDISED under the provisions of this Act, apply to the widow and other representatives of any minister ADMITTED BEFORE the passing of this Act where the benefice is deemed to have become vacant BY ELECTION and the MINISTER SURVIVES the date of standardisation BY ONE YEAR OR MORE.

(3) Save as in this Act expressly provided, nothing contained therein shall affect or be construed to affect the right which the widow or other representatives of a deceased minister has or have by the present law and practice to one half-year's stipend in name of ann.

Effect of
provisions.

In construing the provisions of this section, it will be observed that the test is not, as in sec. 4, the "APPOINTMENT" of the minister to the benefice before or after the passing of the Act, but that he is a minister "ADMITTED" after that date. The considerations already adverted to in dealing with sec. 3 (*supra*, pp. 418 *et seq.*, 441, 442, &c.) would appear to lead to the conclusion that mere election of a minister before the passing of the Act will therefore not avail to conserve the right to ann if his "admission to the benefice" was delayed until after the date of its passing.

The terms of sub-sec. (2) must be kept in view by ministers in considering the propriety of electing to standardise stipend. By so electing, a minister makes the right of his representatives to ANN liable to be

excluded if he should survive the date of standardisation by a year.

ALLOWANCE FOR COMMUNION ELEMENTS.

In modifying stipends the Teind Court has been in use to distinguish between the amount allocated as stipend and the sum due by heritors of a parish for providing Communion elements. The minimum for the latter purpose is £8 6s. 8d. (£100 Scots). This sum was usually awarded if the population of the parish was under or about 2000; from 2000 to 3000, £10; from 3000 to 5000, £12; beyond 5000, £15; when the population approximated to 10,000, £20 might possibly have been granted (but cf. *Minister v. Heritors of Logie*, 1867, 6 M. 82). The allowance is payable in money; if the minister fails to administer the Sacrament at least once annually, or does not expend the whole sum, the balance ought to be applied to pious purposes—*e.g.*, the relief of the poor; and the heritors may compel the minister to apply it (*Heritors of Abdie v. Corsan*, 1713, Mor. 2490; *Heritors of Strathmiglo v. Gillespie*, 1742, Mor. 2491). When there were no surplus teinds the Court would not award a sum against the heritors. If a party voluntarily undertakes to supply Communion elements, his liability is only for so much as may be required, although by a custom for a term of years a greater quantity may have been provided (*Buchanan v. Magistrates of Dunbar* (Dunbar), 1869, 7 M. 576). From an earlier case between the same parties, it appears that the liability of the burgh of Dunbar in this instance rested on a decree of the Commission of Teinds of 1618, which had found the burgh liable “of consent” to furnish Communion elements, an obligation which, in the circumstances, the Court treated as one not affecting the teinds of the parish—a burghal-landward one (*Buchanan v. Magistrates of Dunbar*, 1866, 4 M. 1023).

Under 1925
Act any
allowance for
Communion
elements pay-
able out of
teinds is
included in
"stipend."

Under the definition section, 27 (1) of the Act of 1925, the term "stipend" means the stipend of a minister, "including any allowance for Communion elements *payable by heritors out of teinds.*" In the case of any burgh churches in which any part of the stipend has been payable out of teinds, it would seem that the injunction on the Ecclesiastical Commissioners under sec. 22 (2) (c) to make provision in their scheme for the periodical payment of all sums at present paid or payable to by the magistrates, &c., "in respect of the stipends of the ministers of the burgh churches" would include any sum which had been in use to be paid for Communion elements. In the case of burghs in which the stipends have been payable entirely from other sources than teinds (which is the usual case), the competence of continuing a use and wont payment for Communion elements may perhaps be held to depend on whether in the original obligation for stipend a reference to Communion elements is contained in such terms as to warrant the inference that it was regarded as part and parcel of the stipend. In any case in which such an allowance has been in practice paid to the minister the obligation on the Commissioners under sec. 22 (2) (f) to make provision for "the protection of the rights of" the present incumbents would seem to warrant—if indeed it does not require—provision for the continuance during the incumbency of such allowance. For the provision of Communion elements being a duty of the minister in the absence of other provision for these, the failure to secure to him the allowance hitherto paid would involve *pro tanto* an infraction on his interest.

The expense of providing Communion elements in so far as it is not met from a special allowance would seem, in so far as it falls on the minister to form a proper deduction from his income, as an expense "incurred by him wholly exclusively, and necessarily in the performance of" his duty as minister (*Charlton v.*

Corke (Stranraer), 1889, 17 R. 785). Where these expenses are met out of an allowance included in the decree of the Court of Teinds, the allowance should not be entered as income at all (*ibid*, per Lord Shand, p. 788).

PATRONAGE.

Patronage, or the right to present a duly qualified person to an ecclesiastical benefice, was abolished in Scotland by the Church Patronage (Scotland) Act, 1874 (37 & 38 Vict. c. 82). This repeals the Acts 10 Anne, c. 12, and 6 & 7 Vict. c. 61, and provides that from and after 1st January, 1875, the right of electing and appointing ministers to vacant churches and parishes in Scotland is to be vested in the congregations of such vacant churches and parishes respectively, subject to such regulations in regard to the mode of naming and proposing such ministers by means of a committee chosen by the congregation, and of conducting the election and of making the appointment by the congregation as may from time to time be framed by the General Assembly of the Church of Scotland, or which, after the passing of the Act (7th August, 1874), but before the next meeting of the General Assembly, might be framed by the commission of the last General Assembly duly convened for the purpose of making interim regulations: provided that, with respect to the admission and settlement of ministers appointed in terms of the Act, nothing contained in it shall affect or prejudice the right of the Church, in the exercise of its undoubted powers, to try the qualifications of persons appointed to vacant parishes; and the courts of the Church are declared to have the right to decide finally and conclusively upon the appointment, admission, and settlement in any church and parish of any person as minister. Ministers appointed, admitted, and settled in terms of the Act have in all respects the same rights, privileges, and duties which belonged or

were incumbent on the ministers of the Church at the date of the Act passing (sec. 3).

In the report of the General Committee of the Church of Scotland to the General Assembly of 1926 it was stated (on p. 19) that—

“ The Committee beg to report that the last parish in connection with which patronage compensation falls to be paid in terms of ‘ The Church Patronage (Scotland) Act, 1874,’ viz., Auldearn, became vacant last year owing to the death of the Rev. James Bonallo, who had been minister of the parish from before the passing of the Act up to the date of his death. The amount to meet this payment is in the hands of the Committee, and they are arranging with the agents for the patron for paying over the whole amount at once, under a suitable discount, for prepayment in place of four equal annual instalments, as has been the usual practice. Thus ends a notable and interesting episode in the history of the Church.”

Patronage has thus ceased to hold a place in the living parochial ecclesiastical law of the Church; and the provisions of the Act of 1874, in so far as these are directed to the machinery for the abolition of patronage, have also ceased to be of living interest, except in so far as the Act as a chapter in the statutory law may be open to consideration for the purpose of interpretation of the meaning attached by the Legislature to expressions used in it in construing the same words when used in cognate Acts. (Cf. *supra*, p. 425.) In view of this, and having regard to the amount of new matter falling to be dealt with by reason of recent legislation, it has not been thought necessary here to include matter relating to the history of the institution and the arrangements for its abolition. An

account of these will be found on pp. 226 and 227 of the last edition of this work. In so far as the provisions of the Act of 1874 deal with the right of election by congregations and of appointment by the Presbytery *jure devoluto*, they continue to be operative, subject to any modifications which may be made by the Church in the exercise of the powers recognised as inherent in it under the Church of Scotland Act, 1921. (See especially sec. 1 of the Act and Article III. of the Schedule thereto.) It is therefore proper to give a short account of these.

11 & 12 Geo.
V. c. 24.

If no appointment of a minister is made by a congregation within six months after the vacancy has occurred, the right of appointment accrues and belongs for that time to the Presbytery of the bounds where such parish is, who may proceed to appoint a minister *tanquam jure devoluto* (sec. 7, sub-sec. (1)). The sub-section following provided for the case of a vacant church prior to 1st July, 1875, where the communicants were less than twenty-five in number.

The word "minister" in the Act includes assistant and successor; the word "parish" includes united parishes, and also parishes *quoad sacra*, as well as parishes *quoad omnia*; and where in any church and parish there is more than one benefice, each benefice is to be dealt with and regarded as if it were a separate parish; the words "vacancy" and "vacant" include and refer to the occasion of the appointment of an assistant and successor, as well as the occasion of an ordinary vacancy; the word "congregation" means and includes communicants and such other adherents of the church as the kirk-session, under regulations to be framed by the General Assembly or Commission thereof (see sec. 3), may determine to be members of the congregation for the purposes of the Act.

Who are
included in
"congregation."

Whether the right of appointment under secs. 3 and 4 had accrued to the Presbytery *tanquam jure devoluto* fell to be determined by the Court of Session

(*Stewart, &c. v. Presbytery of Paisley*, 1878, 6 R. 178). In the later case of Old Deer a vacancy occurred in the parish on 23rd May, 1892. A clergyman was elected minister on 25th July. On objections lodged by certain parties the Presbytery of Deer allowed a proof. After certain evidence a joint-minute was lodged, stating that the parties before the Presbytery were agreed that the elected minister was willing that the election of 25th July "be not sustained." The Presbytery pronounced the following deliverance:—"The Presbytery interpones its authority to the joint-minute, and in terms thereof, and with consent of parties, declines to sustain the call, remits the case to the kirk-session and the congregation to proceed in the vacancy in terms of the regulations of the General Assembly." The minister was again elected at a meeting on 30th November, a date seven days after the lapse of six months from the date of vacancy (23rd May). Members of the congregation raised an action against—(a) the minister; (b) the remaining members of the congregation; (c) the Presbytery, for reduction of the second election and for declarator that the right of election had fallen to the Presbytery *tanquam jure devoluto*. The minister alone defended. The First Division held that the Presbytery had determined on 2nd September that the election of 25th July was invalid; that that finding was not open to review by the civil Courts, and that consequently there had been no interruption of the period of six months, and the right of election therefore passed to the Presbytery, and the election of 30th November fell to be reduced (*Craig v. Anderson* (Old Deer), 1893, 20 R. 941).

Whether any addition to the church electoral roll by the enrolment of new communicants should be allowed pending a vacancy was held (*Cassie, &c. v. The General Assembly of the Church of Scotland*, 1878, 9 R. 221) to be a question eminently within the regulating powers of the Church, and which had been finally decided by the judgments of

the Church courts. Opinions were expressed by Lord Gifford and Lord Young, in the case cited, that the *jus devolutum* accrued to the Presbytery when the person appointed by the congregation withdrew his acceptance, and that it was *ultra vires* of the General Assembly to give—as they did—the congregation an additional period to make an appointment; and observations were made on the nature of the right of election and appointment of ministers vested in congregations by the Church Patronage Act, 1874; on the scope and meaning of the declaration in sec. 3, declaring the Church courts “to have the right to decide finally and conclusively upon the appointment, admission, and settlement, in any church and parish, of any person as minister thereof,” and on the jurisdiction of the Court of Session, as the supreme civil Court, to ascertain and define the nature and limits conferred by that statute on congregations, and the Church courts respectively.

As already pointed out, the whole law, statutory and otherwise, hitherto prevalent in regard to the election, &c., of ministers now falls to be read subject to the provisions of the Church of Scotland Act, 1921, which became operative by virtue of the Order in Council of date 28th June, 1926, following on the adoption by the General Assembly of the Declaratory Articles appended to the Act as the Constitution of the Church of Scotland by Act of Assembly passed on 3rd June, 1926, with the consent of a majority of the Presbyteries of the Church.

The Fourth of these Declaratory Articles provides that—

“This Church, as part of the Universal Church wherein the Lord Jesus Christ has appointed a government in the hands of Church office-bearers, receives from Him, its Divine King and Head, and from Him alone, the right and power subject to no

11 & 12 Geo.
V. c. 29.

civil authority to legislate and to adjudicate finally, in all matters of doctrine, worship, government, and discipline in the Church, INCLUDING THE RIGHT TO DETERMINE ALL QUESTIONS CONCERNING MEMBERSHIP AND OFFICE in the Church, the constitution and membership of its courts, and THE MODE OF ELECTION OF ITS OFFICE-BEARERS, and to DEFINE THE BOUNDARIES OF THE SPHERES OF LABOUR OF ITS MINISTERS and other office-bearers. . . .”

And sec. 1 of the Act itself provides that—

Existing statutes and laws on matters spiritual to be construed in conformity with and subordination to the Declaratory Articles; and they are repealed in so far as inconsistent therewith.

“The Declaratory Articles are lawful Articles and the constitution of the Church of Scotland in matters spiritual is as therein set forth, and no limitation of the liberty, rights, and powers in matters spiritual therein set forth shall be derived from any statute or law affecting the Church of Scotland in matters spiritual at present in force, it being hereby provided that in all questions of construction the Declaratory Articles shall prevail, and that all such statutes and laws shall be construed in conformity therewith and in subordination thereto, and all such statutes and laws in so far as they are inconsistent with the Declaratory Articles are hereby repealed and declared to be of no effect.”

CHAPTER XI.

KIRK-SESSION AND CHURCH OFFICERS.

IN the framework of parochial law as it has hitherto existed the KIRK-SESSION (which is composed of the minister and elders of the parish) has occupied a place which may be described as the ecclesiastical counterpart of that which on the civil and administrative side has until now been held by the heritors. As the heritors have been charged with the temporal support of the church, manse, &c., so the KIRK-SESSION has regulated the spiritual affairs of the parish. In normal cases it is true, as was said by Lord Young in the case of *Edinburgh Ecclesiastical Commissioners v. High Kirk Kirk-Session*, 1888, 15 R. 961, that "A kirk-session has no concern with pews or seat rents, or, indeed, with the administration of parish churches in any way. It is a court of the Church, having ecclesiastical duties within the church, but having no concern with the fabric." While this *dictum* was generally applicable to *quoad omnia* parishes as a whole, it was subject to qualification in certain instances, as, *e.g.*, in the case of the Edinburgh churches, which were subject to special provisions under Acts regulating the provision and administration of them; and, in the case of *quoad sacra* parishes, the relation of the kirk-session to the trustees and managers is governed in each case by the terms of the particular deed of constitution. (See *supra*, pp. 27, &c.) The position of matters has been affected now, especially as regards seat-letting and the right to seat rents, by the provisions of the Act of 1925, as hereinafter explained.

The kirk-session: its sphere of operations concerned hitherto with matters spiritual in the main.

The restricted nature of the duties of the kirk-session as regards other than spiritual matters became accentuated when it was relieved of the responsibility which it at one time shared with the heritors for the management of the affairs of the parish poor. As is stated in the Year Book of the Church of Scotland (1928, p. 40), "While the minister in his personal capacity conducts the public worship of God and administers the Sacraments, it is the business of the session to assist him in superintending the social, moral, and religious condition of the people under his charge, to settle the time for dispensing the ordinances of religion in the parish, to judge of the fitness of parishioners who desire to enjoy the privileges of church membership, to exercise discipline on those guilty of scandalous offences, and to grant certificates to members removing from the parish" (and, it may be added, to those requiring to be certified as *bona fide* acting elders for the purpose of qualifying them to act as members of General Assembly).

Composition
of kirk-
session.

The session is composed of the minister (or ministers in collegiate charges) and of ruling elders—the minister and two elders forming a quorum. The minister is moderator of the kirk-session. In collegiate charges the ministers generally fill the office alternately by arrangement between themselves. The election of new elders rests with the kirk-session itself. But this does not prevent consultation of the congregation as to suitable persons for election. And there would seem to be nothing incompetent in the kirk-session making their election from a panel of persons judged by them to be suitable whose names had been submitted or approved by the congregation—the right of and responsibility for election being, however, technically with the kirk-session. The procedure for election is regulated by the church itself, through the General Assembly. (See Article IV. of the Articles forming the Constitution, *infra*, App. II.,

p. 597.) The regulations presently applicable are given in the Church Year Book.

The authority of the kirk-session as a legal court dates from the Act of 1592—"Anent particulare kirkis. Gif they be lauchfully réwlit be sufficiente ministeris and sessioun, they haif power and jurisdiction in their awin congregation in materis ecclesiasticall." The Act of 1690 declares the government of the Church as established by the Act of 1592 to be "by Kirk-Sessions, Presbyteries, Provincial Synods, and General Assemblies."

1592, c. 8.
Alexander's
Abridge-
ment, p. 104.

1690, c. 7,
ibid., p. 365.

As a court of the Church the kirk-session has power, in subordination to the General Assembly, to regulate its procedure (cf. Article IV. of the Articles forming the Constitution of the Church, *infra*, App. II., p. 597). But this would probably be held—at least where its acts touch civil, patrimonial, or personal rights, such as property or character—to be subject to the qualification that its procedure must not be such as to violate any fundamental principle of justice. And in regard to the same matters, if its procedure be defined, its proceedings must be regular according to the procedure as fixed for the time being, as otherwise the particular proceeding may be held not to be one in the due exercise of its jurisdiction.

Powers as to
procedure.

Meetings of kirk-session are held in the session-house, or, failing such a house, in the church. There is no obligation upon heritors to provide a session-house. Where a kirk-session, in transferring a parochial school to a school board under powers in the Education Acts, had reserved a right "to use the school rooms for such purposes as may be deemed necessary when said rooms are not required for the ordinary purposes of education," it was held that the school board was not entitled to sell the buildings without providing the kirk-session with an equivalent for this right of use (*Kirkintilloch Kirk-Session v. Kirkintilloch School Board*, 1911 S.C. 1127). In

Place of
meeting.

this case effect was given to a *dictum* of Lord President Dunedin in the earlier case of the *School Board of Glasgow v. Kirk-Session of Anderston*, 1910 S.C. 195, at 204, that, while such a provision was not technically a real burden; it was a lawful condition of the transference which must be provided for, and that "the school board could not sell unless they arranged with the kirk-session to give them some equivalent for their partial right of occupation."

As already pointed out, one of the functions of a kirk-session is the exercise of ecclesiastical discipline upon those guilty of scandalous offences, a duty which is in modern practice restricted to dealing with parishioners who are members of the church (in the words of the Act, 1592, *supra*, "in their awin congregation"). In discharging this duty it is essential that a kirk-session should act with due regularity.

Kirk-sessions should therefore be very careful as to the information on which they act in cases of discipline. Anonymous communications should be disregarded.¹ In an action of damages for slander, it was held by the presiding judge (the first Lord Ormidale) that "a letter written by a member of a congregation to the minister (as moderator of Bathgate kirk-session) informing him that another member had been charged with drunkenness, sent with a view to inquiry, was privileged" (*Rankine v. Roberts* (Bathgate), 1873, 1 R. 225). In another case a session-clerk brought an action of damages against two members of the kirk-

¹ When Pliny was engaged in endeavouring to suppress the Christian communities of the early Church, he wrote to Trajan, "Mox ipso tractatu, ut fieri solet, diffundente se crimine plures spicas inciderunt. Propositus est libellus sine auctore multorum nomina continens." (Before long, as is often the case, the mere fact that the charge was taken notice of made it commoner, and several distinct cases arose. An unsigned paper was presented, which gave the names of many.) Trajan in his reply approved of Pliny's mode of investigating, but added the caution, "Sine auctore vero propositi libelli in nullo crimine locum habere debent. Nam et pessimi exempli nec nostri saeculi est." (Papers, however, which are presented unsigned ought not to be admitted in any charge, for they are a very bad example and unworthy of our time.)—Pliny, Epp. x. 96, 97 ("Selections from Early Christian Writers," by Gwatkin, 1893, pp. 26, 27, 28, 29).

session “ jointly and severally, or severally, according to their respective liabilities,” on the ground that he had been dismissed from his office by the votes of these members, the pursuer alleging that he had been elected to the office *ad vitam aut culpam*, and that no *culpa* had been proved against him. The pursuer did not claim the office or seek to be restored to it. The action was dismissed as irrelevant (*Goldie v. Christie and Petrie* (Arbirlot), 1868, 6 M. 541). Lord President Inglis observed that, assuming the pursuer held office *ad vitam aut culpam*, if there was no *culpa* to justify his dismissal, his remedy was not by action for reparation, but by declarator and reduction of the sentence dismissing him. For circumstances in which it was held by Lord Stormonth-Darling, Lord Ordinary, that in issues relating to alleged slanderous statements made to a kirk-session, want of probable cause must be put in as well as malice, see *Jack v. Fleming* (Houston), 1891, 19 R. 1.

A letter written by a minister to one of his elders concerning two occasions on which the latter was alleged to have been intoxicated has been held to be privileged (*Doig v. Thomson*, 1898, Sheriff Court of Lanarkshire, 15 Sh.Ct.Rep. 59). Sheriff Strachan in his note said, “ The minister of a parish is a recognised public official, who has charge of the interests of the parish, and whose duty it is to care for and look after the morals of the parishioners, and, along with the kirk-session, of which he is moderator, he is entitled to deal with offending members of his church, ‘ exhorting them, reclaiming them if possible, and rebuking them if necessary.’ ” (See *Croucher v. Inglis*, 1889, 16 R. 774.)

The concern of kirk-sessions with the management of the poor—a subject at one time of importance—has now little but an antiquarian interest. Poor law administration is now practically regulated by the Poor Law (Scotland) Acts, passed from 1845 onwards; and

Kirk-sessions
and provision
for the poor.

57 & 58 Vict. c. 58, secs. 21 and 22. under the Local Government Act of 1894 the parish council became the rating authority for the parishes of Scotland, for poor law as well as for other purposes.^{1a} While in May, 1891, there were still fifty-one parishes in which the management of the poor was retained in the hands of authorities acting under statutes prior to the Poor Law Act of 1845, by the commencement of the present century the number of parishes in which the poor were still supported by church collections or a voluntary assessment alone had fallen to five; and it is understood that there are now none in which this is the case.

8 & 9 Vict. c. 83. By the Act 1672, c. 42 [18], the heritors were conjoined with the kirk-session of each landward parish in administering the legal provision for the poor provided

Alexander's Abridgement, p. 307. *Ibid.*, p. 55. by the Act 1579, c. 12 [74], by which Act the authority and obligation had been conferred on the justices. In burghs the obligation remained, as fixed by the Act of 1579, with the magistrates. Relative to Act 1672, c. 42 [18], are three proclamations of the Privy Council of (1) 11th August, 1692; (2) 29th August, 1693; (3) 31st July, 1694. Three later Acts, and one proclamation, confirm their authority, viz., Act 1695, c. 74 *Ibid.*, p. 390. [43]; Act 1696, c. 29; Proclamation, 3rd March, 1698; *Ibid.*, p. 398. Act 1698, c. 40 [21]. *Ibid.*, p. 407.

Application of church-door collections for poor. Church-door collections were among the funds available for poor relief purposes. These were originally under the control of the kirk-session; by the proclamation of 1693, one-half of these collections was to be paid to the heritors, but they practically continued under the special charge of the kirk-session. Under sec. 54 of the Poor Law Act, 1845, 8 & 9 Vict. c. 83, they still continued to be so, subject to the provisions therein. This section provided that—

“ In all parishes in which it has been agreed that an assessment shall be levied for the

^{1a} See, however, the Rating (Scotland) Act, 1926 (16 & 17 Geo. V. c. 47), which has made important changes in the machinery for collecting local rates. (Cf. App. IV., pp. 625, &c.)

relief of the poor all moneys arising from the ordinary church collections shall, from and after the date on which such assessment shall have been imposed, belong to and be at the disposal of the KIRK-SESSION of each parish."

But this was subject to the proviso that—

" Nothing herein contained shall be held to authorise the kirk-session of any parish to apply the proceeds of such church collections to purposes other than those to which the same are now in whole or in part legally applicable, or to deprive the heritors of their right to examine the accounts of the kirk-session, and to inquire into the manner in which the funds have been applied; *provided also* that the session-clerk or other officer to be appointed by the kirk-session shall be bound to report annually, or oftener if required, to the Board of Supervision as to the application of the moneys arising from church collections; and, if such session-clerk or other officer shall refuse to make such report when required, he shall be liable to a penalty not exceeding five pounds."

By sec. 48 and the Twelfth Schedule of the Church of Scotland Act, 1925, the words from " provided also " to the end of sec. 54 of the Act of 1845 are repealed. The result would seem to be that kirk-sessions of old parishes are still in their dealings *with ordinary church collections* subject to the restraints and duties imposed by the earlier proviso, but are no longer liable to render the accounts provided for in the concluding part of sec. 54 of the 1845 Act.

The kirk-session also administered, in many cases, *pious bequests* (*Liddle v. Kirk-Session of Bathgate*, 1854, 16 D. 1075; *Hardie v. Kirk-Session of Linlithgow*, 1855, 18 D. 37). Sums derived from *letting*

mortcloths, dues for proclamations of marriage, and baptism dues (when these were not emoluments of the session-clerk), stakes under the Act 1621, c. 14 (see *Paterson v. Macqueen*, 1866, 4 M. 602), and fines paid under 1661, c. 38, were available for such pious uses.

By sec. 52 of the Act of 1845, it was provided that —“ Where any property whatsoever . . . shall at the time of the passing of this Act belong to and be vested in the HERITORS and KIRK-SESSION of any parish or . . . other persons on behalf of the said heritors and kirk-session, . . . under any Act of Parliament, or under any law or usage, or in virtue of gift, grant, bequest, or otherwise, for the use or benefit of the poor of such parish . . . it shall from and after a time to be fixed by the Board of Supervision be lawful for the parochial board of such parish to receive and administer such property and revenues, and the right thereto shall be vested in such parochial board,” and the heritors, &c., were authorised to transfer such property, &c., accordingly. By the following section, 53, provision is made for the investment of all moneys, &c., which had been or which might thereafter be given, mortified, or bequeathed for the use of the poor, and which should become vested in the parochial board for this purpose.

In construing a bequest for the benefit of “ the poor of the parish of Kinloss,” it was held that poor persons other than those in receipt of parochial relief were properly included (*Kinloss Parish Council v. Morgan*, 1908 S.C. 192). In *St. Nicholas Kirk-Session v. St. George’s-in-the-West Kirk-Session* (Aberdeen), 1915 S.C. 834, on a petition being presented for approval of a scheme for administration of funds held by a kirk-session under a trust constituted in 1846 for education of the children of poor parishioners, it was held that the kirk-session of a *quoad sacra* parish which had been disjoined in 1880 was entitled to a share of the funds.

When the proceeds of church-door collections, and other voluntary offerings for the relief of the poor, were not adequate, the heritors were required to impose an assessment upon themselves (see Act 1579, c. 74, and other Acts there cited). But heritors were liable only for the support of aged and impotent paupers (*Abbey Parish of Paisley v. Richmond*, 1821, 1 S. 177; *Thomson v. Lindsay*, 1849, 11 D. 719, affd. 1 Macq. 120 and 155). The kirk-session and heritors (here, all proprietors of lands and houses liable for payment of cess under a *cumulo* valuation) (*Robertson v. Murdoch*, 1830, 8 S. 587; see also *Collector of Poor's Rates for Inveresk v. Magistrates of Musselburgh*, 1794, Mor. 10,585) formed a Poor-Law Board. Each heritor had a vote, and both heritors and members of kirk-session were entitled to vote by proxy. The Sheriff had jurisdiction over the Board's proceedings to see that the members attended to their duties of parochial relief.

Another important and still subsisting sphere of duty of kirk-sessions is that which relates to

THE POOR'S ROLL.

The purpose of the poor's roll (which is a valuable factor in Scottish judicial administration) is to protect the poor litigant's interest, and to enable him to have his case fully brought before the proper tribunal. A statute of 1424 (c. 24) provides—"And gif there bee onie pure creature, for faulte of cunning, or dispenses, that cannot nor may not follow his cause, the King for love of God, sall ordaine the judge before quhom the cause suld be determined, to purwey and get a leill and a wise advocate to follow sik pure creatures' causes." Alexander's
Abridgement, p. 2.

The remedy seems to have been appreciated more by the poor than by the advocates, for a century later King James V. complains to the Court of Session that "we are daly infestit be the complant of divers

our pure leiges, persewand for justice, quhilkis are posponit therfra in defalt of advocatis, to procure for thane, and thai have na expenssis to do the samin.” The Court of Session to amend this passed an Act of Sederunt, appointing two advocates as counsel for the poor, with a salary for one of them of £10 per annum. In the following year Friday was set apart as the day for hearing poor folk’s causes. In 1686 an Act of Sederunt required persons who desired to take advantage of the Act of 1424 to state what process they were engaged in, and the assistance of the bar was restricted to such processes. This Act was probably passed to limit a tendency to litigate at large, very natural when a poor man with a grievance of many branches, or susceptible of alleviation by process against one person if it failed against another, found himself in the position of having an attentive advocate, who was bound to give him his best aid without charge. Possibly members of the bar got tired of the poor man’s grievances before they should have done so; at all events, an Act of Sederunt, dated 9th June, 1710, directed that counsel who began a case should continue it to the end. By another Act of Sederunt, passed thirty years later (16th June, 1742), the duty was devolved upon the Dean of Faculty of Advocates, and the Writers to the Signet, of giving in annually to the Clerk of Court a list of the lawyers chosen for the year to defend poor’s causes. The conditions upon which both counsel and agents give their services free to poor persons are, that no person shall have the benefit of the poor’s roll unless it is ascertained (1) that he is in poor circumstances, and (2) that he has a probable cause of litigation. “This is for their protection,” said Lord Young in *Paterson v. Linlithgow Police Commissioners* (1888, 15 R. 826), “I have always thought for nothing else, because, where any one sues another for an alleged wrong, it is infinitely better for the defender, there being a probable cause of action ascertained, that his

adversary should be in the hands of the agent and counsel for the poor than in the hands of others who take up his case only upon speculation. Therefore the report upon *probabilis causa* and poverty is really to protect the professional bodies against that gratuitous assistance being given to persons who are well able to afford the cost of litigation, or who have no *probabilis causa*."

Various Acts of Sederunt were from time to time passed regulating the admission of parties to the poor's roll. The matter is now governed, so far as the Court of Session and High Court of Justiciary are concerned, by the provisions of Book A, Chap. X., of the Codifying Act of Sederunt of 1913. Of these, the most important (omitting provisions dealing with matters of mere procedure after admission to the roll) are the following:—

1. *Appointment of Counsel and Agents for the Poor and of Reporters on Probabilis Causa*.—The Faculty of Advocates shall at each anniversary meeting appoint six of their number to be counsel for the poor; and the Writers to the Signet and the Solicitors before the Supreme Courts shall each, in the month of December annually, appoint four of their number respectively to be agents for the poor, two in the Court of Session, and two in the High Court of Justiciary. The said bodies shall also at the same time respectively appoint two advocates, one Writer to the Signet and one solicitor before the Supreme Courts to act exclusively as reporters on the *probabilis causa* of applicants for the benefits of the poor's roll. Lists of the counsel and agents for the poor and reporters on the *probabilis causa* so appointed shall forthwith be furnished to the principal clerk in each Division of the Court, to the Clerk of Justiciary, and also to the Keeper of the Minute-Book, to be by him printed and published in January yearly.

2. *Certificate of Poverty*.—No person shall be entitled to the benefit of the poor's roll unless he shall produce a certificate under the hands of the minister and two elders of the parish where such poor person resides, setting forth his or her circumstances in the form of Schedule A, hereto annexed.

3. *Procedure in obtaining such Certificate*.—If the party's health admit of it, he shall appear personally

before the minister and elders, at the time and place to be appointed by them, to be examined as to the facts required by said schedule; and the minister and elders shall then certify how far the statement given by the party consists with their own proper knowledge, or that of any one of them, or whether its credit rests on the information of others, or solely on the statement of the applicant, in which latter case they shall certify whether he be of good character and worthy of credit.

The form of the certificate to be given is as follows:—

SCHEDULE A.

Form for the Use of the Clergy in framing Certificates of Poverty, before referred to, secs. 2 and 3.

We, the undersigned, minister and elders of the parish of _____, do hereby certify, that on the _____ day of _____, A. B., residing at _____, applying for the benefit of the poor's roll to enable him [or her] to carry on a lawsuit about to be brought [or presently depending] before the Court of Session, appeared personally before us, and did in our presence [*if the adverse party or his agent be present, add,* and in presence of C. D., designing him] emit the following statement in regard to his [or her] circumstances and situation:—

That he [or she] is _____ years of age.

That he [or she] is unmarried [or married, as the case may be].

That he [or she] has _____ number of children under such an age, or in such or such circumstances.

That he [or she] has resided in this parish [specify the time].

That he [or she] is possessed of [here specify particularly the applicant's property of every description].

That he [or she] is [state the trade or occupation] in which his [or her] earnings amount to [state amount].

That he [or she] has not at present any other lawsuit depending before this or any other Court [or if the applicant has any other lawsuit, the case should be particularly mentioned].

[The minister and elders will then add whether the whole, or any and what part of the foregoing statement is consistent with their own proper knowledge, or with the proper knowledge of any one of them, or whether it is verified by persons known to them, or whether its credit is to depend entirely on the statement of the applicant, and

whether he or she is of good character and worthy of credit, or, if the case admit of it, they may add any other *causa scientiæ* that may occur to them. See sec. 3, *supra*.]

To be signed by the minister and two elders.

4. *Intimation to Opposite Party*.—Ten days' previous intimation, by letter post-paid, shall be given to the adverse party, of the time and place fixed for making the said declaration or statement before the minister and elders, the despatch of such letter to be certified by the agent of the pauper or by a messenger-at-arms, or other officer of the law, and one witness, the certificate to be in the form of Schedule B, hereto annexed.

SCHEDULE B.

Certificate referred to in sec. 4, supra.

I [agent or messenger] certify that of the date hereof I put into the Post Office of _____, between the hours of _____ and _____, in the presence of A. B., residing in _____ and hereto subscribing, a letter or notice addressed to C. D., merchant.

5. *Certificate of Poverty to be lodged in Court and Intimated in Minute-Book*.—The said declaration of the party and certificate of the ministers and elders, with the certificate of intimation to the adverse party, shall be transmitted, free of expense, to one of the agents for conducting the causes of the poor for the time, and shall not more than three months from the date of the declaration, and as much sooner as circumstances will permit, be lodged, with an inventory thereof, in the office of the clerk of one of the Divisions of the Inner House; and if the same shall appear to the said clerk or his assistant to be in proper form, notice thereof shall be forthwith entered in the minute-book.

After some sections dealing with details of procedure before the Reporters on *probabilis causa*, and consequent on their report, the Act of Sederunt proceeds—

13. *Poor's Counsel and Agent alone to Act in Poor's Cause. Neglect of Duty by Poor's Agent*.—No other advocate or agent than those appointed as herein provided shall be employed, or allow their names to be used in any stage of the cause, unless, on application to the Lord Ordinary or the Court by note, to be signed by the advocate

or agent already appointed, the assistance of one of the other counsel or agents for the poor shall be specially authorised; in which case those first appointed, and those so added, shall thereafter act conjointly in the same cause.

15. *Expense of Admission to Poor's Roll.*—The expense of the application, and procedure thereon, for admission to the poor's roll, shall at no future period form any charge at the instance of the agent against the pauper, except to the extent of the actual outlay of the agent: And further, the said expenses of admission shall form no part of the charge for "expenses of process" which may afterwards be found due against the adverse party in the principal cause: Reserving, however, to the Inner House, at the time of the admission, if there shall appear to have been unreasonable or vexatious opposition to the applicant's admission, to dispose of the matter of expenses thereby occasioned as to their Lordships shall seem proper.

Although a party may have been admitted to the benefit of the roll, this may be withdrawn in case of change of circumstances, or on report by a Lord Ordinary that the pauper has not a *probabilis causa litigandi*. If admission be before the raising of action, the action must be raised within three months of admission, otherwise the warrants fall (C.A.S. Bk. A, Ch. X., secs. 9 and 10).

Nature of
function of
minister and
elders in
certifying.

In certifying as above provided for, the ministers and elders do not sit as judges; they have no business to express opinions as to the applicant's case; what they have to do is simply to see that the privileges of the roll are not abused. In a sense they are ecclesiastical officers acting in the discharge of a civil duty, just as is a minister when calling a meeting of heritors, with the business of which meeting he has legally no concern. For this reason the duty of inquiry is naturally limited to the parish minister, as his office alone is a *munus publicum*. This doctrine, if carried to an extreme, might require every application to be made to the minister of a parish *quoad omnia*, or civil, to the exclusion of the minister of a parish *quoad sacra*. This was indeed

Normally
duty confined
to parish
minister.

decided in *Bell v. Bell*, 1840, 3 D. 204, but subsequently the Court held that the certificate of the minister of a parish *quoad sacra* was sufficient, on the ground that, as it was in the *quoad sacra* parish the applicant resided, the minister of that parish "must be best acquainted with the circumstances of the applicant" (*Murrie v. M'Donald*, 1853, 16 D. 325).

Where the minister and one elder constituted the entire kirk-session of a parish, it was held (*Mitchell*, 1851, 14 D. 248) that their certificates satisfied the conditions of the law. In ordinary circumstances, the minister and elders of a dissenting church are not entitled to grant a certificate for the purpose of admission to the poor's roll (*Elphinston*, 1836, 14 S. 463). But in the case of *Carrigan*, 1881, 9 R. 149, the applicant belonged to the Old Kirk Parish of Edinburgh, and its kirk-session was in abeyance when she made her application for admittance to the poor's roll. In lieu of a certificate from the minister and elders of that parish, therefore, she produced a certificate by the minister and two of the elders of the High Kirk of Edinburgh—the church in which the banns of marriage of parishioners of her own parish were published. To this certificate was appended a note that the statement made in it had been furnished by the minister of the Cowgate Free Church, of whose congregation the poor person was a member. In the circumstances the First Division of the Court of Session dispensed with strict adherence to the provisions of the Act of Sederunt of 1842, and admitted the applicant to the roll. And in the case of *Maciver*, 1907 S.C. 552, on a note being presented for admission by an applicant who was bedridden, and who resided at a distance of twenty miles from the parish church, the Court remitted to a U.F. minister who resided near to the applicant's residence and to two members of his kirk-session to take the applicant's declaration of poverty, and, if so advised, to grant him a certificate of poverty in the usual

Relaxation
in exceptional
cases.

form. In the case of *Flynn*, 1882, 9 R. 909, the Court allowed an Irishman, who had resided in the parish of Lasswade, and had, while working there, received an injury which resulted in the loss of his leg, to appear before a magistrate in county Mayo, to which he had removed, and emit the declaration required by the Act of Sederunt, and held the declaration before the magistrate as being a sufficient compliance with the requirements of that Act. In the case of Scottish soldiers stationed in England or abroad, remit has more than once been made to the chaplain of the applicant's regiment to grant the requisite certificate (*Forrest*, 1907 S.C. 435 (England); and *Sorrells*, 1909 S.C. 238 (India). If a certificate be granted, the Court will not *ex proprio motu* consider the question whether the circumstances of an applicant are such as to entitle him to the benefit of the roll; in order to raise the question the adverse party must state an objection when a remit to the reporters on *probabilis causa* is made.

Remedy on failure to discharge duty.

If the clergyman and elders refuse to take the applicant's declaration, and occasion him delay and expense, the Court holds them liable in expenses to him (*Morris*, 1835, 13 S. 1092). But the Court has occasionally, on such cases coming before them, remitted to the Sheriff of the county, instead of the minister and elders, to make inquiries into the applicant's circumstances (*Rattray*, 1824, 3 S. 232; *Macellar*, 1863, 1 M. 1114).

Degree of poverty justifying admission to poor's roll.

What degree of poverty entitles a man to be admitted to the poor's roll? This must always be a matter of circumstances, and cases occurring prior to the war are not of much value as guides to the amount of income which will be regarded as sufficient to exclude an applicant under present-day conditions, save in so far as they illustrate general principles.

A person who is in receipt of parochial relief must sue *in forma pauperis*, or find caution for expenses (*Hunter v. Clark*, 1874, 1 R. 1154; *Robertson v.*

Suburban District Committee of Mid-Lothian County Council, 1898, 25 R. 569).

An undischarged bankrupt, who was sued for damages for seduction, and whose trustee refused to sist himself as a party to the action, was admitted to the poor's roll by the First Division (*Whyte*, 1884, 11 R. 1145). In *Milne v. Milne*, 1885, 13 R. 304, where a husband, pursuer in an action for divorce, was suffering from bad health and partial blindness, and had no funds from which he could pay the expenses of his wife's defence, the First Division of the Court of Session sisted process to enable him to have both parties admitted to the poor's roll, Lord Adams observing: "It is very desirable that actions of divorce should be defended, and that the Court should get all the information possible." (See, too, *Robertson*, *infra*.)

The practice of the First and Second Divisions was for some time scarcely uniform as to the degree of poverty, as indicated by wage-earnings, which entitles a man to be admitted to the poor's roll. In *Robertson's* case, 1880, 7 R. 1092, the First Division admitted a man who had been a warder in Jedburgh jail at a wage of 23s. a week (but who had recently been dismissed), in respect his wife had deserted him, and was living in adultery, that he was burdened with two young children, and was about to raise an action for divorce. But Lord President Inglis observed: "Under ordinary circumstances, a man earning 23s. a week is not entitled to be admitted, nor does it make any difference that, for the time, he is out of employment; the fact that accidentally he may be out of employment does not alter the case." Robertson's wife was at the same time admitted to the roll.

The Second Division more readily admitted persons of fair means. In *Stevens v. Stevens*, 1885, 12 R. 548, the applicant was in the employment of the Parochial Board of West Calder, on a salary of £138 per annum, out of which he had, for his daily work,

to provide for a man, horse, and cart, which cost him about £85 per annum, and was burdened with the support of an invalid son. His wife had obtained decree against him in an action of separation and aliment, and he wished to take proceedings in the Court of Session to obtain a reduction of the amount of aliment awarded against him. His wife opposed his admission to the roll. The reporters were of opinion that the applicant had a *probabilis causa litigandi*. The Court decided to admit him to the roll. Lord Craighill, however, dissented, remarking: "The applicant is the owner of a cart and the owner of a horse, and that seems to me to be inconsistent with the notion of his being a person entitled to the benefit of the poor's roll. It is quite true that, rightly or wrongly, we have of late been opening the door more widely than we used to do in cases of this sort, but I do not remember any case in which we have gone so far as we are asked to do here; and, if this man is to be considered a fit person for admission to the poor's roll, many people will find themselves entitled to litigate *in forma pauperis* who have no idea that they possess such a right."

The same Division, four months later, decided in *Wright v. Brown's Trustees*, 1885, 12 R. 959, that a marine engineer employed on foreign voyages at 18s. a week, but who was out of employment owing to his remaining in this country in order to superintend personally intended litigation for damages for failure to implement an agreement in reference to certain letters-patent, was entitled to the benefit of the poor's roll. Lord Rutherford Clark dissented from the Court's judgment, distinguishing this case from that of *Stevens, supra*, because the applicant here might have brought his action in the Sheriff Court if he had chosen, but in *Stevens'* case the action proposed was competent only in the Court of Session. In the same year, the Second Division decided *Anderson v. Blackwood*, 1885, 12 R. 1262, when a miner, whose wages

were 15s. a week, was admitted to the poor's roll to prosecute an appeal in an action for damages for personal injury, in which both the Sheriff-Substitute and the Sheriff had decided against him; Lord Young observed: "I should wish to put this plain question as the test of admission or non-admission. Are the man's circumstances such that he cannot pay his way in the Court of Session? For if he cannot, and he is reported to have a *probabilis causa litigandi*, and there is nothing to suggest that the case in an exceptional one, then I should always be prepared to admit him." Lord Justice-Clerk Moncreiff did not dissent, but observed that he wished to reserve his opinion entirely as to the principle Lord Young had suggested.

In *Paterson v. Linlithgow Police Commissioners*, 1888, 15 R. 826, the Second Division admitted to the poor's roll a blacksmith earning 27s. a week, but who had a wife and family dependent on him. Lord Rutherford Clark dissented, and observed, evidently with reference to *Robertson's* case (*supra*), decided by the First Division, and Lord President Inglis' observations—"I do not think that we ought to establish a practice inconsistent with that of the other Division. There may be cases of exceptional circumstances which may prompt the relaxation of the ordinary rule, but this is not such a case." In 1906 a porter with £60 a year, who had been served with an action of adherence and aliment at the instance of his wife, desiring to raise an action of divorce against her, for which he had satisfied the reporters that he had *probabilis causa*, was admitted by the Court to the benefit of the roll (*Brown*, 1906, 8 F. 687). In this case the nominal pursuer was, however, substantially defender, having been brought into Court in the first instance by his wife. (Cf. per Lord Justice-Clerk.)

The decision of the reporters as to *probabilis causa* is regarded by the Court as final, unless there has been gross miscarriage of justice or failure in duty (M'Intosh v. Roy, 1898, 25 R. 899). If the reporters

How far are
reporters
final on
probable
cause.

are equally divided in opinion, the Court generally decides in favour of the admissibility of the applicant.

In appeals from the Sheriff Court, where the Sheriff-Substitute and Sheriff had both decided against the poor person, and the reporters were divided in opinion, the First Division of the Court of Session, in *Carr, &c. v. North British Railway Co.*, 1885, 13 R. 113, refused to admit the applicant to the poor's roll. Lord President Inglis observed: "Persons in the position of the applicant here, raising actions of this kind [*i.e.*, for damage for personal injury] in the Sheriff Court, ought to be satisfied with the judgment obtained there, and I am not for encouraging them to carry their litigations any further." This decision was followed by the Second Division in *Watson v. Callander Coal Co.*, 1888, 16 R. 111.

A pupil or minor may apply for admission to the poor's roll by, or with consent of, his guardian. If he has no guardian, a curator *ad litem* must be appointed. It was observed by Lord Low (Lord Ordinary) in *M'Ternan v. Bennett*, 1898, 1 F. 333, that proceedings by a person to get himself put upon the poor's roll in order that he might raise an action against two police constables for damages could not be regarded as the commencement of an action within the meaning of the Public Authorities' Protection Act, 1893, which limits the raising of such actions to a period of six months after the act complained of.

In Sheriff Court admission to poor's roll is on certificate by inspector of poor.

A poor person may also have the benefit of the poor's roll in the Sheriff Court.² The matter is now regulated by the Sheriff Courts Act of 1907, under the provisions of which the duty of certifying as to the circumstances of an applicant is transferred to the local inspector of poor. Sec. LI. of the Act provides—

LI. *Poor's roll*.—Where parties are unable from poverty to pursue or defend an action, it shall be lawful

² For the former practice see Act of Sederunt, 16th January, 1877, and art., The Poor's Roll, in S.L.Rev., January, 1894, vol. 10, p. 11.

for the sheriff to admit such parties to the benefit of the poor's roll if, upon the report of the procurators for the poor, he is satisfied that such person is entitled thereto.

The detailed regulations are contained in Nos. 152 to 169 of the rules in Schedule I. of the Act. These provide for the appointment of procurators for the poor, and for the conduct of cases by them on lines analogous to those prevailing in the supreme Court. The only rules which need be cited here are the following:—

162. *Applicant to produce certificate of poverty.*—Along with his application for the benefit of the poor's roll, the applicant shall produce a certificate signed by the inspector or an assistant inspector of poor of the parish or district where the applicant resides, bearing that the applicant is unable, through poverty, to pay for the conduct of legal proceedings.

163. *Application to be remitted to procurators for poor.*—The sheriff shall remit the application to the procurators for the poor who shall notify the parties, and after inquiry shall make a report to the sheriff.

164. *If they report applicant entitled, sheriff to appoint an agent to conduct cause.*—If they report that the applicant has a probable cause of action and is entitled to the benefit of the poor's roll, the sheriff shall appoint one of the agents to take charge of the applicant's case.

165. *Agent to conclude cause.*—Such agent shall conduct the cause to its final issue, notwithstanding that during its progress he may have ceased to be an agent for the poor.

166. *Agent to have no claim for fees unless recovered from other party.*—Unless expenses shall be awarded against and recovered from the opposite party, the agent shall have no claim for fees; but the litigant shall be liable to him for actual outlays incurred with the litigant's sanction.

OTHER FUNCTIONS AND RIGHTS OF KIRK-SESSIONS.

It is the province of the kirk-session to fix the occasions and the hours when the *church bells* are to be rung. “I think it is reasonably plain,” said Lord Selborne, “that by assuming to regulate the hours of ringing these bells on Sundays for purposes of public

Kirk-sessions regulate the ringing of the church bell.

worship, the magistrates have, in two respects, trespassed upon the proper province of the kirk-session, and have violated the substance of the contract as to the employment of the bells 'for the parish,' first, by fixing the particular hours at which the bells shall be rung for such purposes, whereas the right to fix those hours belongs properly to the kirk-session; and, secondly, by doing this with a view to other worship than that of the parish church, for which it would be wrong and unlawful, both on principle and according to the decision in the *Paisley* case (*M'Naughton v. Magistrates of Paisley*, 1835, 13 S. 432), to ring any bell or bells which had been lawfully provided by the heritors in discharge of their legal obligation for the purposes of the parish" (*Magistrates of Peebles v. Kirk-Session of Peebles*, 1875, 2 R. (H.L.) 124, 125).

Right of
kirk-session
to transfer
of communion
plate, &c.,
under Act
of 1925,
15 & 16
Geo. V.
c. 33.

Under sec. 21 (1) (j) of the Church of Scotland (Property and Endowments) Act, 1925, the Scottish Ecclesiastical Commissioners may, after such inquiry in each individual case as they may think fit, make such orders as they may consider necessary or proper for the transfer to a kirk-session of communion plate or other ecclesiastical furnishings in use in a church or by a congregation in any case in which a right of property in the plate or other furnishings is claimed by any public body. This seems necessarily to imply a title in the kirk-session interested to apply to the Commissioners for an order in an appropriate case. The circumstances figured in the section will probably be found to exist principally in the case of burgh churches; but, given the appropriate circumstances, the scope of the section is quite general.

Right under
1925 Act to
allocate
sitting
accommoda-
tion and
collect and
dispose of
seat rents.

An important addition is made by sec. 29 of the Act of 1925 to the rights of kirk-sessions of parishes *quoad omnia* (see sec. 26), inasmuch as it is therein provided that—

“On the expiry of one year from the date on which any church is by or in pursuance of

this Act transferred to the General Trustees, the right of allocating sitting accommodation in the church, whether with or without payment therefor, and the right of disposal of any proceeds therefrom shall belong to the KIRK-SESSION or to such other body as the General Assembly may direct, and any existing right to such accommodation shall cease and determine. (See *supra*, Chaps. II., pp. 111, &c., IV., pp. 145, 147, 153, and V., pp. 214, &c.)

Failing some direction to the contrary by the General Assembly affecting any parish, the section will operate in favour of the kirk-session.

At common law a minister and kirk-session have been held, in a Sheriff Court, entitled to interdict a seatholder from distributing pamphlets and leaflets on controversial subjects within the precincts of the church, and causing annoyance during Divine service (*Gardiner, &c. v. Munro*, 1889, 5 Sh.Ct.Rep. 205).

Mention has already been made (*supra*, Chap. V., pp. 253, &c.) to the provisions contained in sec. 32 (5) for a kirk-session being entitled within ten years from the passing of the Act in the case of a churchyard closed before the passing of the Act, or within ten years of the closing of one closed subsequent to that date, intimating in writing to the parish council or other local authority to which such churchyard has been transferred its desire to take over the custody, maintenance, and control of such churchyard, and on such intimation to require transference accordingly, subject to such conditions, if any, as the parish council or other local authority concerned may appoint for public right of access to the churchyard free of charge (sec. 32 (5) (a)). Moreover, even if the kirk-session should have failed to intimate its desire within the prescribed period, sec. 32 (5) (b) allows the council or other authority at any time, upon an application in writing of the kirk-session, to transfer the custody, &c.,

Right to transfer of closed, &c., churchyards of parish.

of a churchyard of a parish which has been closed or has ceased to be used for interment. Where such transfer has taken place, responsibility for custody, maintenance, and control, and for any expense in connection therewith, passes to the kirk-session taking these over (sec. 32 (5) (c)).

In the case of a churchyard, the control, &c., of which has been thus transferred to a kirk-session, the kirk-session would seem to be the body with whom any arrangements under sec. 33 of the Act for preservation of monuments, &c., in the churchyard would require to be made.

Kirk-session
and procla-
mation of
banns;
amount of
fees exigible.

Kirk-sessions were long accustomed to fix the amount of fees to be paid by parties for *proclamation of banns*. By the Marriage Notice (Scotland) Act, 1878 (41 & 42 Vict. c. 43), it was provided that *the fee of the registrar for publishing notice* of an intended marriage should be 2s. 6d. The General Assembly in 1879 passed an interim Act providing that the fee for proclamation of banns and certificate should not exceed that sum. The action of the General Assembly in interfering in the matter of fees has been criticised, it being urged that the proclamation of banns is a matter *inter sacra*, and that the Assembly for the first time in 1879, and erroneously, included in its enactments the *inter civilia* element of fees. This provision was carried forward into the Act of Assembly of the following year, Act VIII. Ass., May 28, 1880, sec. 11, which contains the general regulations presently governing the proclamation of banns. It is thought, however, that until the Act is declared by a competent court to be *ultra vires*, it must be regarded as obligatory upon kirk-sessions. Apart from this, it is on the ground that proclamation of banns is a matter properly *inter sacra* that proclamation takes place in the churches of parishes *quoad sacra*. If proclamation of banns, and the charge for it, were *inter civilia*, proclamation logically should remain the pertinent alone of the parish church *quoad*

omnia; but see *Hutton, &c. v Harper, &c.* (Wishaw), March 9, 1876 (H.L.), 3 R. 9. The matter of proclamation has historically been regarded as one appropriate to the church, and has from time to time been dealt with by Acts of Assembly. (See per Lord President Inglis in *Hutton, supra*, at p. 903.) There was no obligation upon the General Assembly to deal with the question of the amount of the charges for proclamation, but its power to do so cannot be lightly questioned—the more so, as to permit kirk-sessions to charge higher fees than the registrar would obviously have the effect of encouraging persons to adopt the cheaper course, and thus decidedly put the ancient procedure of proclamation in church under a handicap. Such fees are payable to the session-clerk, who is the official of the church. And there seems to be no reason why the church should not prescribe the limit of fee to be drawn by its official for performing an ecclesiastical service.

By the Local Government (Scotland) Act, 1894 (57 & 58 Vict. c. 58, sec. 30), it is provided that where trustees hold any property wholly or mainly for the benefit of the inhabitants of a single parish, or any of them as such inhabitants, or for any public purpose connected with a single parish other than (a) for an ecclesiastical charity; (b) for an educational endowment; or (c) for the benefit of the poor of the parish, within the meaning of the Poor Law Act, 1845; they may transfer the property to the parish council of the parish or to persons appointed by that council, and the council, if they accept the transfer (or the persons whom they appoint), shall hold the property on the trusts and subject to the conditions on which the trustees hold it. Should the property not be transferred to the parish council, it may appoint such number of additional persons to act along with the original trustees as the trustees and parish council may agree upon, or, in default of such agreement, as

Position of
property
held by
kirk-session
as trustees
for inhabit-
ants of
parish.

may be approved by the Local Government Board. The Act proceeds, sec. 30, sub-sec. 33—

“Where the trustees of any such property are the kirk-session, or the heritors and KIRK-SESSION of any parish, or the KIRK-SESSION or deacons' court, or managers or vestry of a congregation belonging to any religious denomination, to the number, whether alone or conjoined with others, of not less than six persons, the said trustees shall from time to time appoint certain of their own number, not exceeding three, and the parish council of the parish shall from time to time appoint such number of additional persons as the Board may in each case approve, to act together as a committee of management of said property, and such management shall be transferred to the committee accordingly.

The kirk-session of Bo'ness in 1807 purchased certain lands with money taken from a box called the poor's box or kirk box. The lands were purchased “To improve the poor's money to the best of advantage.” But the funds were not entirely, though they were mainly, derived from church collections, as sums received as proclamation dues, funeral dues, mort-cloth dues, and payments for ringing the church bell had been paid in the same box. The rents of the lands were applied mainly for the benefit of the poor, but to some extent to other purposes connected with the church, such as the salaries of the beadle, session-clerk, and bell-ringer, and the heating, lighting, and repairing of the church, and a tent for field-preaching. The annual payment from the boxes for behoof of the poor exceeded the rent derived from the lands. The parish council of Bo'ness and Carriden raised an action against the kirk-session of Bo'ness, concluding for declarator that in terms of sec. 30 of the Local Government (Scotland) Act, above quoted, the defenders were bound to appoint certain of their number, not exceeding three, to act with certain persons to be appointed by the parish council as a committee of management

of the lands held as above-mentioned for the benefit of the poor of Bo'ness.

The kirk-session contended that the lands were held by them partly for the benefit of the poor and partly for ecclesiastical purposes, and that therefore the properties fell under the class of ecclesiastical charities, the administration of which they were not bound to share with the parish council. The expression, "ecclesiastical charity," is defined by the Act to include "a charity the endowment whereof is held for some one or more of the following purposes:—(a) For theological instruction or for the benefit of any theological institution; or (b) for the benefit of any ecclesiastical person or officer as such; or (c) for use, if a building, as a church, chapel, mission-hall, or room, or Sunday school, or otherwise by any particular church or denomination; or (d) for the maintenance, repair, or improvement of any such building as aforesaid, or for the maintenance of Divine service therein; or (e) otherwise for the benefit of any particular church or denomination, or of any members thereof as such: provided that where any endowment of a charity, other than a building held for any of the purposes aforesaid, is held only for some of the purposes aforesaid, the charity, so far as that endowment is concerned, shall be an ecclesiastical charity within the meaning of this Act." The Second Division of the Court of Session held that, looking to the source from which the money came with which the lands were bought, and the history of the administration and application of the revenues of the lands and other matters, the lands were held for no interest other than that of the poor, and that they were not held for an ecclesiastical charity within the meaning of the Local Government Act; consequently that their management fell to be transferred to a committee as sought by the parish council (*Parish Council of Bo'ness and Carriden v. Kirk-Session of Bo'ness*, 1900, 2 F. 661). In the earlier case of *Prestonpans*

Kirk-Session v. Prestonpans School Board, 1891, 19 R. 193, the Court was required to decide as to the application of certain funds held by a kirk-session, which had originated in a sum raised to provide an infant school, and preferred the object suggested by the kirk, viz., its application towards the erection of a hall to be used as a Sunday school and for congregational purposes in connection with the parish church, rather than the alternative scheme of the school board that the annual revenue should be paid to the board to be applied to increase the efficiency of the teaching staff.

Until the Ecclesiastical Assessments (Scotland) Act, 1900 (63 & 64 Vict. c. 20), came into operation on 1st January, 1901, kirk-sessions had nothing to do with heritors' assessments, but by sec. 2 of that Act (which is not in all possible cases superseded by the provisions of sec. 28 (6) of the Property and Endowments Act, 1925) it is provided that when heritors have resolved to impose an assessment on the real rent, intimation of such resolution is to be made to the kirk-session of the parish, and it has been suggested (*supra*, p. 90) that the intimation should be accompanied by a draft of the proposed scheme of assessment. Sec. 3 provides that the rental on which each heritor is to be assessed shall be his total rental as appearing in the valuation roll, "subject to deduction of the sum of fifty pounds when the amount of the deficiency which would be created in the total amount of the assessment by allowing such deduction to every heritor has been paid to the collector of the assessment by the kirk-session." In cases which may still fall under this provision it appears to be optional to the kirk-session to pay the deficiency. If they do not do so the assessment will proceed in the usual way. Should the kirk-session resolve to make up the deficiency, it would seem they are to pay over the necessary amount to the collector before intimation to each heritor of his liability under the assessment. The kirk-session obtains no representation at meetings of heritors by

such a payment, nor will it have any legal control of the works in respect of which the assessment has been necessary.

But now, where an assessment has been rendered necessary in consequence of anything done, agreed, or ordered to be done in pursuance of sec. 28 of the Property and Endowments Act of 1925, the provisions of sec. 3 of the Act of 1900 are superseded by those contained in sec. 28 (6) of the Act of 1925. Sec. 2 of the Act of 1900 is not repealed, and formally it may be still proper to give notice to the kirk-session concerned where it is proposed to assess upon real rent. But as the deficiency in the assessment due to the £30 allowance provided for in the Act of 1925 has automatically to be borne by the General Trustees, it is difficult to see what interest the kirk-session has in the intimation in a case falling under this Act. (See *supra*, Chap. II., pp. 87-91.)

Real-rent
assessment
under Act
of 1925.

PAROCHIAL ECCLESIASTICAL OFFICERS.

The officials appointed by the heritors were their *Clerks* (*supra*, Chap. III., pp. 116, &c.) and the *Beadle* (*infra*). The kirk-session officials are the minister as *Moderator*, the *Session-Clerk*, *Precentor*, and *Session-Officer* (who may also be beadle and door-keeper, and is frequently called the "Minister's man").

Beadle.—Heritors, or burgh magistrates in a burghal parish, were entitled to appoint the door-keeper or the beadle as the *ostiarius* of the canon law (*Kirk-Session of St. Andrews Church v. Town Council of Edinburgh*, 1835, 13 S. 395). With the transfer of churches to the General Trustees under the Act of 1925, any interest and right of the heritors or burgh in the appointment of the beadle would appear to be terminated. The duties of the BEADLE are well summarised thus: "The doorkeeper is intrusted with the keys of the church, and it is his duty to open the building for the celebration of public worship on Sundays and to afford to the parishioners, when duly

required to do so, access to the building for such purposes as are not inconsistent with the design of and uses to which it may legally be applied. He ought, likewise, to be in attendance at the church during the diets of worship, and, at the termination of the service, open the doors to allow the congregation to disperse in a quiet and orderly manner; and thereafter shut up the building against all access thereto until the next occasion of its legitimate use.” It is probable that in the event of the beadle not performing the duties of door-keeper (another person doing so), this appointment lies with the kirk-session (Duncan, 690, 691). The beadle is the officer of the kirk-session, and the personal attendant of the minister. To him pertain the arrangements for the decent and orderly celebration of the ordinary services and special rites of the church, such as Communion and baptismal services under the direction of the kirk-session. When he held the keys as door-keeper, the beadle represented the heritors in whom was the charge and property of the church. He was paid by the kirk-session, however, not by the heritors. He may be dismissed at any time on proper notice.³ The gravedigger or churchyard officer is appointed by the heritors, and is paid by them.⁴

The *Session-Clerk* is appointed by the kirk-session, and holds office during their pleasure, even although his salary be paid by burgh magistrates, as in the exceptional cases of *Elgin* and *Dundee* (*Magistrates v. Minister of Elgin*, 1740, Mor. 7916 and 13,124; *Kirk-Session v. Magistrates of Dundee*, 1761, 5 Br.Supp. 599). His salary is usually paid by the kirk-session, the heritors having no liability therefor.

³ Pardovan observes that the beadle should hold the keys of any seats that are locked, that when the proprietors are absent such as want seats may be accommodated (bk. ii. xiii. 8). The beadle was included among those who had twice yearly to pass the “privy censure with the kirk-session” (bk. i. xi. 6).

⁴ See *Stodart, &c. v. Lyell* (Tweedsmuir), Nov. 15, 1895, Sheriff Court of Midlothian, 1896, 12 Sh.Ct.Rep. 40.

He attends the meetings of the kirk-session, takes the sederunt and notes, prepares the minutes, engrosses them when approved in the minute-book, which he must preserve faithfully and without alteration, and from which he may as required give certified extracts. When the office is vacant by the suspension, resignation, or death of the clerk, the records should be deposited with the minister or an elder; even although no actual suspension or deposition has taken place, the kirk-session, on reasonable suspicion, may take the records out of the clerk's hands (*Porter v. Auld* (Moneydie), 1850, 13 D. 268).

When the office is temporarily or absolutely vacant the parish minister is usually appointed clerk *ad interim*.

In the case of *Rankine v. Roberts* (Bathgate), 1873, 1 R. 225, the status of a session-clerk was considered with some fullness, though incidentally. A member of a congregation stated to one of the elders openly in his shop, and in the presence of another person, that another member of the congregation, who was also session-clerk, had been drunk and incapable on a certain night. The Court held that the statement was not privileged. Lord Deas observed: "The session-clerk is not necessarily a member of the session, or even of the congregation, nor is an exemplary moral character an indispensable qualification for the office, though it may be a desirable one" (p. 231). Lord Ardmillan, however, observed: "If a member of a Presbyterian congregation does *in bona fide* bring under the notice of the minister and kirk-session the conduct of a member of the congregation, and does so in the regular and becoming manner prescribed by the law and custom of the Church, I think he has some degree of privilege. He is considered as exercising a right, and, it may be, fulfilling a duty. Therefore, even though the charge which he makes turns out on inquiry to be unfounded, he is not necessarily liable in damages. His privilege protects him unless malice is proved" (p. 238).

He added: " This remark is especially applicable and important when the person whose conduct is called in question is not only a member of the congregation and of the church, but is also session-clerk and parochial schoolmaster, a position in which his conduct and character is of unusual importance " (p. 234, *ibid.*).⁵

The *precentor* (or " reader," as he was sometimes called), unless by special agreement it were otherwise provided, was, and where the office still subsists, is appointed by and holds his office at the pleasure of the kirk-session. He is paid by the kirk-session.⁶ His duty is to lead the psalmody of the congregation, and in many parish churches the proclamation of banns is entrusted to him. In 1697 the session of Whitekirk appointed the precentor " to read every Lord's Day the Belief, Lord's Prayer, and Ten Commandments." A precentor was held not entitled, not being an ecclesiastic, to plead the *decennialis et triennalis possessio* in support of a claim against the proprietor of an estate in the parish, for the continuance of a payment in use to be made to him and his predecessors for more than one hundred years (*Traill v. Dangerfield* (Lady Parish), 1870, 8 M. 579).⁷

TRUSTEES AND MANAGERS OF QUOAD SACRA CHURCHES.

The relations of the trustees and managers of *quoad sacra* churches are governed in each particular case by the terms of the trust deed or constitution of the congregation. (See *supra*, Chap. I., pp. 17, 27, *et seq.*)

⁵ This view was applied in the Sheriff Court case of *Doig v. Thomson*, 1898, 15 Sh.Ct.Rep. 59, where it was held by Sheriff-Substitute Strachan (Lanarkshire) that a minister who wrote a moderate letter to one of his elders concerning two occasions on which that elder was intoxicated was privileged in writing the letter, and it is consistent with the trend of modern authority as to privilege.

⁶ *Hislop v. Figgins*, 1863, 1 M. 321; *Stodart, &c. v. Lyell*, 1895, Sheriff Court of Midlothian, 1896, 12 Sh.Ct.Rep. 40.

⁷ As to the office and functions of the " reader," see Edgar's " Old Church Life in Scotland " (1885), pp. 64, 65; Sprott's " Worship and Offices of the Church of Scotland " (1882), p. 14.

CHAPTER XII.

THE PRESBYTERY: ITS FUNCTIONS AND JURISDICTION.

THE functions of the PRESBYTERY are here considered mainly in their relation to the civil side of parochial ecclesiastical affairs. The powers exercised by the PRESBYTERY as an Ecclesiastical Court (save in so far as these have been defined, modified, or otherwise affected by comparatively modern legislation) corresponded broadly with those discharged by the bishops prior to the suppression of that order in 1789 and its final supersession on the re-establishment of the Church in 1690 on the Presbyterian basis originally laid down in 1592. The functions of PRESBYTERIES in relation to the Church and to parishes over which they have supervision are thus concisely stated by Dr. Cook in his manual of "Styles and Procedure in the Church of Scotland"—"The business of the Presbyteries is to examine students of divinity and license them to preach the Gospel: to take trial of presentees" (*i.e.*, since 1874, of persons elected or appointed) "to parishes, and, if they find them qualified, to ordain them to the ministry, and grant them induction; to see that the Word is preached, divine ordinances regularly dispensed, and the various duties of the ministry discharged within the bounds; to take cognisance of the conduct of each minister, and, in the event of any charge being made involving censure, suspension, or deposition from his office, to libel the person accused, to take evidence, to judge of the same, and pronounce sentence accordingly. It is their duty to judge of all complaints, appeals, and references which may come from an inferior Court. And as a civil Court it be-

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Functions
of the
Presbytery.

longs to them to judge and determine in the first instance all matters connected with glebes and the erection and repair of churches and manses" (p. 45).

Composition
of a
Presbytery.

The membership of a Presbytery consists of every minister of a regular charge over any parish situated within the defined district comprised within the jurisdiction of the Presbytery—"the bounds"—of such professors of divinity in any University situated within the bounds as are ministers, and of as many elders sent from every kirk-session as there are ministers in that kirk-session, *i.e.*, in the ordinary case, one, but in the case of a collegiate charge, two, or it may be more. An assistant and successor is eligible to act as member of Presbytery in the absence of his senior colleague, but both may not sit simultaneously. The number of ministers and elders who are at any time members of a Presbytery should thus be equal, except in those Presbyteries within the bounds of which a University is situated, in which case the professorial membership may result in a preponderance of ministers over elders. In the basis of union drawn up in contemplation of union with the United Free Church and sent down by the General Assembly of 1927 for consideration of Presbyteries, &c., considerable modification in the membership of Presbyteries is adumbrated, chiefly in the direction of including senior ministers and ministers *emeriti*. This would result in a number of ministers who are not actually for the time being ministers of congregations within the bounds having seats in the Presbytery larger than has hitherto been the case. But, on the other hand, provision is proposed whereby, by co-option by the Presbytery of sufficient elders, the numerical correspondence between the total number of ministers and elders respectively would be secured with even more exactness than it is at present.

Creation and
rearrange-
ment of
Presbyteries.

The General Assembly has always claimed and exercised the power of disjoining and erecting Presbyteries at its pleasure, and in the exercise of this

power the boundaries of Presbyteries have been altered, the parishes within Presbyteries have been rearranged, and the number of the Presbyteries of the Church has from time to time been increased as circumstances have required. As the grouping of parishes into Presbyteries does not affect the organisation of the parish itself as a quasi-civil unit, there was no occasion for invoking the intervention or co-operation of the Court of Teinds in making such changes. And the exclusive power of the Church in regard thereto is unequivocally affirmed in the fourth of the Articles forming the Constitution of the Church, as set out in the Schedule to the Church of Scotland Act, 1921, and in Act VII. of the Legislative Acts of Assembly passed by the General Assembly of 1926. (See *infra*, Appendix II., pp. 597-598.) The number of Presbyteries in the Church at the present time is 84, varying in the number of individual charges embraced in them from 5 at the one end of the scale to as many as 108, in the case of Glasgow, at the other. An inevitable incident of the accomplishment of the union now in contemplation will be a drastic rearrangement of Presbyteries with regard to the parochial and congregational units composing them. But the indications at present point to the problem arising from the greatly increased number of such units which will fall to be included being solved not by an increase in the number of Presbyteries, but rather by a regrouping which will bring about greater uniformity in the size of the Presbyteries, and so enable the total number to be reduced rather than increased. (See draft Scheme for Rearrangement of Presbyteries, printed as an Appendix to the Report of the Conferring Committee on Union, sent down for consideration of Presbyteries, &c., by the General Assembly of 1927.)

“ The Presbytery is a Court established by law, Presbytery is and what is called a Court of Record ” (per Lord ^{a recognised Court of} Moncreiff in *Edinburgh Presbytery v. Edinburgh Uni-* Record.

versity, 1898, 28 S.L.R. 567, at p. 573). Being such, its records were held by Lord Moncreiff in this case to belong to, and to be held by the Presbytery of Edinburgh for behoof of the public, to the effect of rendering them *extra commercium*, and therefore of making them incapable of becoming private property by alienation—*e.g.*, by sale or gift—the title to recover them from a donee or even from a purchaser not being lost even by the running of the years of the long prescription.

Independent
jurisdiction of
Presbytery ;

The freedom from control in the exercise of jurisdiction which this recognition of the PRESBYTERY as an established Court of the land involves was defined by Lord President Inglis in *The Presbytery of Leys v. Fraser*, 1874, 1 R. 888, at p. 892, as follows:—

Abridgement,
p. 376.

“ We are dealing with a Presbytery, an established judicature of the country, as much recognised by law as the Court of Session itself. Its jurisdiction, indeed, differs widely from that of the civil Courts, but it is just as much the creation of law as that of any other Court in the kingdom.” And after referring to the Act 1693, c. 38, as the principal statutory basis of this recognised jurisdiction, he added,

will be aided
by civil
Courts in
compelling
attendance of
witnesses.

“ I want nothing stronger or more comprehensive than that. Wherever the Church Courts are unable themselves to carry out their own orders made to explicate their own jurisdiction, the civil Courts are bound to step in and give “ all due assistance.” And in the same case Lord Deas observed (p. 893) that “ The petitioners form one of the established judicatories of the land, with certain judicial duties to perform. The case before them is a libel against a clergyman for immorality, on grounds which, if found proved, may infer suspension or deposition from his office. The jurisdiction of the petitioners to try that libel is undoubted. It is a trite maxim that jurisdiction implies all the powers necessary to explicate that jurisdiction. In so far as the Presbytery as a Church Court cannot directly compel the attendance of witnesses in a case of

this kind, they are entitled to do it indirectly by the aid of the civil Court. They have a judicial duty to perform which they cannot perform without such aid, and that, to my mind, is itself conclusive of the question." In this case both the Lord President and Lord Deas disclaimed deciding anything as to the cognate question of the position of a non-established (voluntary) church in regard to obtaining such aid from the civil Courts. But Lord Ardmillan (p. 894) said—"I am further of opinion, and on broader ground, that the aid of the civil Court to enforce the attendance of witnesses may be given, and ought to be given, when craved and required, even in causes within churches not established—that is, within a voluntarily constituted jurisdiction. This is well illustrated by the case of arbitration. The interposition by the civil Court to compel a witness to attend and depone before an arbiter has been frequently exercised, and authoritatively recognised. On this point there are decisions from time to time between 1690 and 1860, and the practice has been accordingly." (Cf. *The Lord Advocate, Petitioner*, 1909 S.C. 199, for an instance of such intervention in aid of the process of a foreign Court, and *Brown v. M'Dougall*, 1901, 4 F. 297, for an instance of exercise of the explicative jurisdiction of the civil Court by interdict in aid of the enforcement of a judgment of deposition pronounced by the domestic tribunal of a non-established church.)

In the earlier case of *Wight v. Dunkeld Presbytery*, 1870, 8 M. 921, Lord Justice-Clerk Moncreiff, in disclaiming any right in the Court of Session to sit in review, as if it were an appellate Court, upon judgments of the Courts of the Church of Scotland said—
 "The jurisdiction of the Church Courts, as recognised judicatories of this realm, rests on a similar statutory foundation to that under which we administer justice within these walls. It is easy to suggest extravagant instances of excess of power, but quite

Immunity
from review of
judgments of
Presbyteries
and other
Church
Courts acting
within their
proper
sphere.

as easy to do so in regard to the one jurisdiction as to the other. Within their spiritual province the Church Courts are as supreme as we are within the civil; and, as this is a matter relating to the discipline of the Church, and solely within the cognisance of the Church Courts, I think we have no power whatever to interfere." In this case, on the same grounds, Lord Cowan refused even to consider whether the proceedings were regular or not, holding that the civil Court had no jurisdiction: For the wide extent of the jurisdiction thus recognised and of the immunity attendant on it of the Church Courts—acting within the proper limits of their jurisdiction—from having their judgments reviewed by, or their members held liable in damages for these judgments in the civil Courts, and also for a discussion of the possible limits of this immunity (see *Sturrock v. Greig* (Blairgowrie), 1849, 11 D. 1220; and *Lockhart v. Presbytery of Deer*, 1851 (Fraserburgh), 13 D. 1296). Notwithstanding the implication of a limitation where irregularity of procedure can be alleged suggested by the statement in the rubric of the former case that "No action of damages will lie against a Church Court of the Established Church for any sentence or judgment pronounced by them in a proper case of discipline, duly brought before them, *regularly conducted* and within their competency and province as a Church Court," it is clear from the judgments pronounced in the cases cited, and especially from those in the later case, that even alleged irregularity of procedure will not detract from the immunity from review enjoyed by such judgments. In the case of *Lockhart* it was sought to suspend a sentence of deposition by a Presbytery on the ground of what Lord President Boyle described as "very clamant statements of irregularity of the mode in which the case was conducted before the Presbytery" (13 D. at p. 1299). But the Lord President went on to dispose of the case thus—"We have just as little right to interfere with the procedure of the

Church Courts in matters of ecclesiastical jurisdiction as we have to interfere with the proceedings of the Court of Justiciary in a criminal question." But, on the other hand, *Sturrock v. Greig, supra*, clearly recognises that if a Presbytery or other Church Court presumes to deal with a matter outwith its proper jurisdiction, any judgment at which it may arrive will be open to challenge in the civil Court if it should affect any patrimonial interest. In dealing with charges affecting the conduct of a minister, the jurisdiction of the Presbytery is primary, such charges not being within the sphere of cognisance of a kirk-session. Such a process may proceed at the instance either of the Presbytery or of individual parishioners. But cases of discipline affecting members of a congregation, or members of a kirk-session other than the minister, fall to be dealt with in the first instance by the kirk-session concerned (cf. *supra*, pp. 462, 464, &c.), the jurisdiction of the Presbytery in regard to these being appellate.

Presbytery has primarily jurisdiction to deal with charges against a minister.

In *Presbytery of Fordyce v. Shanks*, 1849, 11 D. 1361, it was held that the Presbytery had title to insist that churches and chapels within its bounds should be used for the purposes for which they were erected, and also to enforce the observance of the constitutions which had been granted to such chapels by the General Assembly; and similarly, in vindication of property dedicated to pious uses within its bounds, a Presbytery may sue a third party upon a grant for pious uses made to a kirk-session within the bounds, and that without the consent of the kirk-session (*Perth Magistrates v. Perth Ministers*, 1730, 1 Paton, 39, affg. Mor. 10,723).

A Presbytery has title to vindicate ecclesiastical property dedicated to use of congregations within the bounds.

In practice, among the most important administrative functions which have been discharged by Presbyteries in the region of parochial ecclesiastical law have been those referred to in the last sentence of the passage which has been quoted from Dr. Cook's manual, viz., the determination, in the first instance,

Functions in regard to glebes, churches, &c.

of all matters connected with glebes, and the erection and repairs of churches and manses, including also the designation and enlargement of churchyards where necessary. During the last half-century the exercise of these functions has been regulated by the provisions of the Ecclesiastical Buildings and Glebes Act, 1868; but the functions themselves were independent of, and existed long anterior to this Act, which was merely regulative of the manner of their exercise.

31 & 32 Vict.
c. 36.

Former
powers of
Presbyteries
in regard to
repair of
churches and
manses.

The title of the Presbytery of the bounds to intervene where a church or manse was in need of repair and heritors refused to do the necessary work voluntarily, and to require the heritors to do their duty in the matter, finds ample support and illustration in the earlier reports. (Cf., *e.g.*, *Cunninghame v. Deans* (Stewarton), Dec. 12, 1811, F.C.; *Campbell* (Dunoon), May 19, 1815, F.C.; *Porterfield v. Gardner* (Kilmalcolm), 1829, 8 S. 277; and *M'Neel v. Robertson* (Stranraer), 1836, 14 S. 849.)

Powers
recognised at
common law.

“The relations of the heritors and the Presbytery in a matter of this kind are peculiar,” observed Lord President Inglis in the case of *The Presbytery of Deer v. The Heritors of Pitsligo*, 1876, 3 R. 975. “The heritors,” he added, “are bound to maintain the ecclesiastical buildings. The Presbytery are the guardians and conservators of the benefice, and it is their office to see that all parties connected with the parish do their duty, and they may give orders to any one who is not doing his duty. They have control over the minister, over the church officers, and also over the heritors in regard to their obligation to uphold the ecclesiastical buildings.” Reference may also be made on this matter to the remarks of Lord Justice-Clerk Moncreiff in *Duke of Abercorn v. Edinburgh Presbytery* (Duddingston), 1870, 8 M. at p. 738. The intervention of the Presbytery as such guardians and conservators of the benefice might be invoked by any interested party bringing the matter before them—by the minister (*Hamilton v. Hamilton Presbytery* (Both-

well), 1827, 6 S. 47; *M'Neill v. Nicolson* (Barra), 1828, 6 S. 422); by a heritor (*Maxwell v. Gordon* (Anwoth), 1816, 4 Dow's Apps. 279); a parishioner, or a member of Presbytery. In the case of *Heritors of Kingoldrum v. Haldane*, 1863, 1 M. 325, there will be found an interesting examination by Lord Jervis-woode of many of the earlier decisions relative to the powers of the Presbytery in regard to seeing to the provision and upkeep of a manse.

As a guide to the conduct of those on whom the duty has now devolved, it may be noted that in the case of the *Presbytery of Deer*, *supra*, Lord President Inglis laid down the common law thus—"Where a complaint was made that the manse was out of repair, it was the duty of the Presbytery to inform their minds on that subject, and, if they required the advice of an expert, they were entitled and bound to take it, and, according to immemorial usage, they were entitled to do so at the expense of the heritors" (p. 977). It was the more necessary and proper that the Presbytery should do this, as obviously the Presbytery could not have the same familiarity with, or knowledge of, the requirements of the parish as the heritors had; and it was therefore appropriate that they should on no account intervene without taking the fullest and most adequate precautions by obtaining the report of a man of skill and by acquiring from all available sources such information as was obtainable relative to the parochial ecclesiastical buildings. The considerations which dictated this as the appropriate course in the case of a Presbytery exercising its powers in regard to ecclesiastical buildings within its bounds would seem to apply even more cogently to the central body (the General Trustees), who are now charged with attention to the like matters under the Property and Endowments Act, 1925.

On the heritors receiving notice from a Presbytery of the repairs which were considered necessary, or a copy of a deliverance thereanent, it was the custom

Submission of
plans by
heritors.

of the heritors to submit plans for perusal of the Presbytery whose concern was, however, not with the mode or style of the proposed building, but merely with its sufficiency (*Campbell* (Dunoon), May 19, 1815, F.C.). But the Presbytery had no power to compel exhibition of plans for repairs undertaken without an order previously made by that Court (*Minister v. Heritors of Tingwall*, 1787, Mor. 7929). If the heritors neglected to carry out the operations, unless the deliverance was appealed against, the Presbytery might lawfully enter into contracts to do the work themselves (*Dunbar* (Wick), 1804, Mor., Jurisdiction App. 11; *Sanderson v. Macfarlane* (Duddingston), 1868, 6 M. 701). In such a case the heritors had a right to supervise the work. The Presbytery had no right to assess the heritors for the cost, the proper course being that, on completion of the work, the Presbytery should call upon them to assess themselves, and in case of their failure to do so decern against them for the cost on their valued or real rent, according to the rule of assessment in use in the parish. In such a case the Presbytery might appoint a collector, who had a right of relief against the Presbytery for his costs and disbursements if he were unsuccessful in enforcing the decree of the Presbytery as against the heritors (*Earl of Glasgow v. Miller* (Neilston), 1831, 9 S. 370; affd. 7 W. & S. 185).

31 & 32 Vict.
c. 96.

Procedure
under the Act
of 1868.

By the Ecclesiastical Buildings and Glebes Act, 1868, a code of procedure was provided whereby in any proceedings before any Presbytery of the Church of Scotland "relating to the building, rebuilding, repairing, adding to, or other alteration of churches or manses, or to the designing or excambing of sites therefor, or to the designing or excambing of glebes or additions to glebes, or to the designing or excambing of sites for or additions to churchyards and the suitable maintenance thereof (including the building or repairing of churchyard walls," any heritor or the minister of the parish, if dissatisfied with any order,

finding, &c., of the Presbytery, might appeal from the Presbytery to the Sheriff in manner therein provided (sec. 3).

It is unnecessary here to enter into details of the procedure thus introduced, under which for upwards of fifty years proceedings in regard to the matters mentioned were conducted, on the whole efficiently and satisfactorily. Because by sec. 27 of the Property and Endowments Act, 1925, it is enacted no proceedings in regard to the matters in question shall be instituted or entertained before or by any Presbytery or any Court of law or by the Commissioners under the Act except as is in the Act provided, save in so far as regards proceedings actually instituted before 1st February, 1925. (Cf. *supra*, Chap. IX., pp. 358, &c.)

Superseded
by the
Property and
Endowments
Act, 1925.

It should be observed that the prohibition is not merely as to the institution or entertaining of proceedings under the Act of 1868. It extends to forbidding proceedings "*relating to any of the matters mentioned in sec. 3*" of the Act of 1868, except as is otherwise provided in the Act of 1925. The result appears to be to bring to an end, at least in the form hitherto prevalent, the historic function of the Presbytery as "guardians and conservators" of the ecclesiastical buildings within its bounds. For ensuring the enforcement of the provisions made under the Act of 1925 for the putting of churches and manse into the state of repair provided for by that Act before transference of them to the General Trustees it will fall to these Trustees to do what is necessary to see that the heritors implement their obligations. The particulars of the powers conferred on them have been considered under the appropriate headings in the preceding chapters. While, however, the Presbyteries have thus been superseded in their powers of independent action, the local knowledge possessed by them and the long experience of their members in the discharge of the functions which are under consideration, has doubtless enabled Presbyteries to give an amount of

Duty of
enforcing
obligations of
heritors for
final repair
of buildings
now on
General
Trustees.

assistance in the carrying through of this transition stage most useful to the General Trustees. The future position in regard to responsibility for the repair and maintenance of churches and manses is not free from obscurity. It is, indeed, clear that, under sec. 27 of the 1925 Act already quoted, the existing powers of supervision of the Presbyteries are at an end; and, indeed, necessarily so. For, under sec. 28 (3) (a), upon the certificate therein mentioned being recorded, any liability or obligation incumbent on any heritor in connection with the ecclesiastical buildings covered by the certificate is at an end except as regards assessments previously incurred. And, similarly, by the operation of secs. 30 and 32, obligations hitherto resting upon heritors in regard to glebes and churchyards will be superseded.

Is there liability enforceable against any one to keep a transferred church or manse in repair?

It is of course also clear that there can be no further proceedings taken against any one for *provision* of a church, manse, or glebe. (With regard to the provision of burial grounds, this has passed out of the sphere of ecclesiastical into that of civil administration.) But as regards ministers who are actually in office prior to the transfer of ecclesiastical buildings under the Act of 1925, the right to have a church and manse, maintained in a state of reasonable repair is part of the benefice to which they became entitled upon their appointment. The old machinery for the securing of this has been swept away; and, save for the temporary provision for repair before transference, nothing appears to have been substituted. But it is obvious that the Church in its own interest must take steps for ensuring for the future the upkeep of the parochial ecclesiastical buildings at least as efficiently as the provisions of the older law have hitherto done. This will doubtless be achieved by the provision, in some form, of a fabric fund. And there seems reason to believe from the proposals relative to this which have been put forward that the ancient function of the Presbytery as guardians and

conservators of the properties of the benefice will not be allowed to fall into abeyance; but that to the Presbyteries will be committed the duty of supervising and reporting upon the state of the ecclesiastical buildings within their bounds at regular intervals. (See Report to the General Assembly of 1927.)

DUTIES IMPOSED ON PRESBYTERIES UNDER THE PROPERTY AND ENDOWMENTS ACT, 1925.

Under this Act and the relative Acts of Sederunt there are a number of important duties laid upon Presbyteries either directly or through their clerks. Of these the most important are the following:—
Under sec. 2 and Schedule II. (a), where a benefice is vacant, the Presbytery “concerned” may, through its clerk, take the initiative in applying to the Clerk of Teinds to fix the former county average value of any kind of victual in which the whole or any part of the stipend of a parish is localised which is not mentioned in the First Schedule to the Act; and that whether or not the value of the kind of victual is given in the official returns of fiars prices.

Functions of
Presbyteries
in matters
arising under
the Property
and Endow-
ments Act,
1925.

Under sec. 2, sub-sec. (2), a Presbytery “concerned” may apply to the Sheriff to give instructions to the Clerk of Teinds in terms of the sub-section with regard to “any special method of calculation of stipend customary in that parish.” This application may be made at any time before the expiry of six months after the date of standardisation, and the right of the Presbytery to make it does not seem to be dependent upon the benefice being vacant.

Under sec. 4 the Presbytery is entitled to receive, through its clerk, intimation in writing of any election by a minister that his stipend shall be standardised; and, similarly, under sec. 5, intimation has to be made to the Presbytery through the clerk of any standardisation by notification of the General Trustees.

Under sec. 11 and the relative Schedule V. it is the duty of the clerk of the Presbytery in which a benefice which becomes vacant (either actually or constructively) is situated "forthwith" to intimate the vacancy to the Clerk of Teinds.

Under sec. 28 (4) it shall be lawful for, *inter alios*, the Presbytery "concerned" to apply to the Sheriff to find and declare that the case of a parish falling within that sub-section by reason of there being some public body or kirk-session or person liable along with, or in place of, the heritors in the obligations relating to the church or manse ought to be dealt with by the Commissioners to the effect therein prescribed.

Furtherly, under sec. 30, the duty is laid upon the clerk of every Presbytery within one year after the passing of the Act to furnish to the Commissioners a list of the glebes appropriated to the ministers of the parishes in the Presbytery, together with the further information specified in sec. 30 (1); and at the same time he must intimate in what cases it is claimed by the PRESBYTERY (whether on the representation of the minister concerned or otherwise) that the heritors have not fully implemented the obligations incumbent upon them according to the present law and practice with respect to provision and enlargement of the glebe.

Duty to furnish particulars as to glebes required under 1925 Act is on Presbytery,

In regard to this duty it should be noted that it is specifically laid upon the clerk to each Presbytery. It would therefore appear that the duty of obtaining the information which it is thus directed to lay through its clerk before the Commissioners rests upon the Presbytery itself, and not upon either the General Trustees or the ministers of the parishes concerned. The Presbytery seems here to be treated in its ancient character as guardian and conservator of the benefice. It is proper that it should have made available to it the assistance of the ministers who, as incumbents of the particular benefices, may be supposed to be most cognisant of the facts relating to particular glebes.

But there appears to be no provision which would warrant a Presbytery in throwing the burden of collecting the information upon an unwilling incumbent—still less of requiring such an incumbent to incur any expense in investigation. which cannot require incumbent to incur expense in investigations.

For the duty laid upon the clerk of a Presbytery to inform the collector of the Ministers, &c., Widows' Fund of a vacancy in a *quoad sacra* parish within the bounds the stipend of which, being capable of standardisation, has not been standardised at the date of the vacancy and otherwise in relation to the Fund, see Chap. X., *supra*, pp. 414, *et seq.*

CHAPTER XIII.

THE CHURCH OF SCOTLAND GENERAL TRUSTEES.

Origin and
functions of
the General
Trustees.

SINCE the publication of the last edition of this book, there has come into being a new body which occupies an important place in the economy of the Church of Scotland, that, namely, which is incorporated under the name of the "Church of Scotland General Trustees." Originally, indeed, the functions of these Trustees lay in a different region from that of parochial ecclesiastical law. But under the provisions of the Church of Scotland (Property and Endowments) Act, 1925, arrangements for the standardisation and redemption of stipend and for the vesting of endowments of the Church of Scotland in the Church itself in property have come to centre to a large extent in the corporation of the General Trustees—to such an extent, indeed, as to bring the Trustees into a relation with each individual parish which will be practically as close in the future as that of the heritors has been in the past. It is, therefore, appropriate that some account should be given of the origin and the statutory position and powers to this important ecclesiastical body.

The conception of a single centralised body of Trustees for the purposes of holding properties which were formerly held by various bodies of Trustees on behalf of the different committees of the Church was first formulated in a report of the General Committee of the Church of Scotland presented to the General Assembly in May, 1920. This narrated the inconvenience and unnecessary expense caused through the holding of heritable properties and investments on

behalf of the several committees of the Church in the names of different sets of particular Trustees; and recommended the transference of these properties and investments to official Trustees of the Church. It was, however, pointed out that such transference would require the authority of a Provisional Order. The convenience of such an arrangement had already been experienced in the case of more than one of the non-established Churches. The General Assembly of the Church of Scotland resolved to act on the recommendation made to it.

In the Act of the General Assembly of 1920 appointing the Commission of Assembly, power was conferred upon the Commission to appoint General Trustees for the Church "to hold the heritable properties, investments, and securities presently vested in and held by Trustees for and on behalf of committees of the General Assembly of the Church, and to approve of the draft Provisional Order to be promoted for incorporating such Trustees and vesting in the incorporated body the said heritable properties and securities." This deliverance was duly acted upon, and on 17th November, 1920, the Commission of Assembly resolved that eight persons (named) be the General Trustees of the Church, and have their names inserted in a draft Provisional Order, which was approved by the Commission. The necessary steps were at once taken for the promotion of a Provisional Order, which was duly made by the Secretary for Scotland and confirmed by Parliament by the Church of Scotland (General Trustees) Order Confirmation Act, 1921, to which the Royal Assent was given on 8th November, 1921.

Under this Order, upon its commencement and subject to its provisions, certain gentlemen (eleven in number), and the survivors and survivor of them, and their and his successors, and any additional members to be nominated and appointed as in the Order

The General Trustees incorporated.

Every trustee must be either a minister or elder of the Church.

appointed or as in the Order provided, were declared to be and were incorporated by the name of "The Church of Scotland General Trustees," and were by that name declared to be a body corporate with perpetual succession, a common seal, and the other powers and privileges of a body corporate. Each of the members of the corporation must be either a minister or an elder of the Church of Scotland, and in the event of any person who should be a member of the corporation ceasing to be a minister or elder of the Church it was provided that he should *ipso facto* cease to be a member of the corporation. Under the Order the corporation was enjoined to report to the General Assembly all vacancies in its membership, and the General Assembly was empowered to remove any member, and also to nominate and appoint members either as additional members or in place of members who should die, resign, become disqualified, or be removed.

Extent of transference of properties, &c., to General Trustees under original Order of 1921.

The principal advantage which at the time of the obtaining of the Order was in view of the promoters in seeking it was the creation of an incorporated body of Trustees for the holding of property held for behoof of the various committees of the Church. Accordingly, provision was made by the Order whereby any heritable property and investments held by Trustees for specified committees of the Church should be transferred by these Trustees to the General Trustees; and certain specified properties and investments scheduled to the Order were transferred *ipso facto* by its own force. All properties transferred either by or in virtue of the provisions of the Order are held by the General Trustees for the same ends, uses, and purposes as those for which they were held by the Trustees or other persons in whom they were vested, or by whom they were held prior to the transference to the General Trustees, where such purposes were expressly defined, and, failing such expression or definition, they are

held subject to the directions of the committee on whose behalf they are held or the General Assembly.

The Order contains necessary administrative provisions provided for officials, and for meetings of the corporation which is empowered to receive and hold on behalf of any committee of Assembly, or association which makes a report to the General Assembly, any funds, &c., which may be adjusted to it. The funds, &c., held under the Order may be invested in certain specified investments. In the event of any question or dispute arising between the General Trustees and any committee or association having funds held by the corporation in name of the Trustees, such dispute is, by the Order, appointed to be referred to the General Committee of the Church, whose decision shall be final and binding on all parties. The General Assembly is empowered to make bye-laws and regulations to be observed by the corporation in the discharge of its duties under the Order.

In its inception the corporation, hereinafter referred to as "the General Trustees," was thus essentially a holding body in which was vested the assets of certain Central Committees of the Church and such kindred organisations, to be held and administered by the General Trustees and applied by them for the purposes and under the instructions of the various committees or of the General Assembly.

But with the passing of the Property and Endowments Act of 1925 the whole position of the Trustees was radically altered. From being such a mere holding body related only to certain Central Committees, they were converted into a body coming into close and immediate relation with every parish in the Church, in whom practically the whole parochial property of the Church became vested, and who were charged with important powers and functions in regard not only to the preservation and investment, but also to the administration thereof. The particular rights

Expansion
of scope of
General
Trustees'
functions by
Act of 1925.

and powers so conferred upon them are noticed in detail below. Before going on to consider these in detail it is desirable to note certain general additions to the powers of the Trustees which were made under the Act of 1925 in order to fit them the better for the new duties entrusted to them.

In sec. 37 of the Act, it is provided that—

Powers to hold, maintain, and dispose of property.

Right of pre-emption in case of sale, &c., of glebes, given to adjoining heritors.

Powers of compromise.

In addition to any powers which they already enjoy, the General Trustees shall have power to hold, maintain, administer, and dispose of any property of whatsoever description transferred to, or received by, or vested in them under, or in pursuance of this Act, subject always to the provisions of this Act and to the directions of the General Assembly: Provided that the General Trustees before selling or feuing a glebe or any part thereof shall give to the heritor or heritors whose lands adjoin such glebe or part an opportunity to purchase or take the same in feu at such price or feu-duty and on such terms as may be agreed upon between the General Trustees and the heritor or heritors, or as may, failing agreement, be determined by an arbiter appointed by the sheriff on the application of either party. Without prejudice to the foregoing generality, the General Trustees shall have power, subject as aforesaid, to compromise or settle any claim against or by any heritor or other person arising out of anything contained in this Act or done thereunder.

Further, under the next sec. 38, provision is made as follows:—

Power to appoint officials.

- (1) The General Assembly shall have power to appoint from among the General Trustees a chairman and a vice-chairman of the General Trustees who shall respectively

hold office for such period with such powers and duties, and subject to such conditions as the General Assembly may determine, and such chairman and vice-chairman or either of them may receive such remuneration as the General Assembly may from time to time fix. Such chairman, whom failing such vice-chairman, shall when present act as chairman at all meetings of the General Trustees, and when so present shall come in place of any chairman falling to be appointed under section thirteen of the Church of Scotland (General Trustees) Order, 1921, and shall have the like voting powers. Without prejudice to the provisions of the said section with respect to the manner in which meetings of the General Trustees may be called, the chairman or the vice-chairman appointed by the General Assembly may direct that meetings of the General Trustees shall be called.

- (2) The General Trustees shall have power to Solicitors, &c. appoint or employ (either from among their own number or otherwise) a solicitor or legal adviser to the General Trustees and such additional officers, attorneys, and persons as they may consider necessary for the proper conduct of the business of the General Trustees, and to pay to such solicitor or legal adviser or other officers, attorneys, or persons employed by them suitable remuneration for their services.
- (3) Any intimation to the General Trustees shall Intimations, how made. be competently made if addressed to the clerk or the chairman or vice-chairman of the General Trustees on their behalf at the known address of the General Trustees in Edinburgh, and any intimation by the General Trustees shall be compe-

tently made by the clerk or the chairman or vice-chairman on their behalf.

Quorum.

- (4) The General Assembly shall have power to determine from time to time the number of General Trustees who shall form a quorum at meetings of the General Trustees, provided always that the number so determined shall in no case be less than three as prescribed in section thirteen of the Church of Scotland (General Trustees) Order, 1921.

Expenses to be dealt with by General Assembly.

- (5) All expenses incurred by the General Trustees in the discharge of their duties under this Act, so far as such expenses are not otherwise provided for under this Act, shall be defrayed in such manner as the General Assembly may determine, and the provisions of section nineteen of the said Order of 1921 shall not apply to such expenses.

Bye-laws and Regulations.

- (6) The General Assembly may from time to time make bye-laws and regulations to be observed by the General Trustees in the discharge of their duties under this Act.

Under the powers herein conferred upon the General Assembly the number of the General Trustees has for the present been fixed at forty and the quorum at three; and a chairman and vice-chairman have been duly appointed to preside over them.

GENERAL RIGHTS AND DUTIES OF THE GENERAL TRUSTEES UNDER THE ACT OF 1925.

Position of General Trustees in relation to standardisation and collection, &c., of stipend when standardised.

Under Part I. of the Act relating to "stipend and teind," a very important power is conferred upon the General Trustees of setting in motion the provisions for standardisation of stipend, with the statutory consequences following thereon, by anticipating the occurrence of an actual vacancy in a parish by the death of or demission by the minister thereof at the

date of the passing of the Act, and that by creating a "notional" vacancy in the parish under the provisions in sec. 5. The method by which this is done has been already explained in detail; and it is unnecessary to recapitulate it here. It is sufficient to recall that it is a condition of such action on the part of their Trustees that they shall give to the minister in office at the passing of the Act an undertaking securing to him that the amount of his stipend according to the present law and practice will continue to be paid to him by the General Trustees until he ceases to be minister of the parish, and otherwise providing in the manner and to the effect set forth in sec. 5 (1) of the Act.

As from the date of standardisation (in whatever way this is occasioned) the stipend standardised is for the future to be no longer payable by the heritors to the minister according to the usage which has hitherto prevailed. Instead, it becomes payable half-yearly at the terms of Whitsunday and Martinmas, and to the General Trustees as hereinbefore explained; and, with respect to all payments of the standardised stipend before it is converted into a real burden or redeemed or extinguished, the General Trustees are to have all the powers of recovery which according to the present law and practice a minister has in respect of his stipend.

After standardisation, it is for the General Trustees to initiate and carry through the proceedings for an augmentation where such is competent. Once a standard charge has been constituted a real burden upon the lands from the teinds of which it is exigible, the General Trustees are the creditors by whom payment can be enforced; and they may enter into any agreement in regard to the redemption of the standard charge; they are also to receive payment of the charges and payments described in the Seventh Schedule to the Act, and any other payments which are charged on and payable out of the Consolidated Fund, and they may contract for the redemption of these.

Rights in regard to augmentations.

Rights and duties with regard to ecclesiastical buildings, &c.

The scheme of Parts II. and III. of the Act provides for the transfer to the General Trustees of all rights of property in and power of administration over ecclesiastical buildings, money payments, and other rights which have hitherto been held by or for the benefit of the Church either by the heritors or by Corporations or other bodies or persons other than private trustees. The specific rights to be acquired by them and the duties imposed upon them in regard to the particular subjects are dealt with in detail under the appropriate headings. In regard to ecclesiastical buildings, it is for the General Trustees to form an opinion as to whether or not any church or manse is in a reasonable state of tenantable repair, and, if not, whether the duty of executing repairs is upon the heritors. And the General Trustees may act upon the opinion so formed either by agreement with the heritors, by application to the Sheriff under sec. 28 (1) or by the admission of the fulfilment of obligations under sec. 28(2).

Extent of duty in regard to glebes.

In regard to glebes, as has been shown, the furnishing of information is primarily the duty of the Presbytery of the bounds, and the formulating of orders is the duty of the Ecclesiastical Commissioners—the function of the General Trustees being merely that of transferees of the subjects—of which, however, after transfer, the ownership will be with them. The General Trustees have power, however, to come to an agreement as to the conversion into a money payment of any right of pasturage over lands which is possessed by any minister as minister of a parish; and the result of such agreement would doubtless be embodied in the scheme for the glebe to which it related.

Sec. 30(3)(f).

Transfer of endowments of *quoad sacra* parishes.

Under sec. 34 of the Act, provisions are made relating to *quoad sacra* parishes for achieving in regard to these a complete transfer of the statutory endowments of these parishes to the General Trustees, similar, in so far as circumstances permit, in its nature to that provided in Part III. in the case of parishes *quoad omnia*. Shortly put, the result is in the case

of old *quoad sacra* parishes, to provide for the transfer to the General Trustees, and, in the case of new *quoad sacra* parishes, to provide for the vesting in these Trustees, of the whole statutory properties and endowments of each parish. (*Supra*, Chap. IV., pp. 167, *et seq.*)

Without entering upon any exhaustive enumeration, it may be said generally that the Act constitutes the General Trustees the creditors who are entitled to receive on behalf of the Church as a whole, or of the particular parishes, the various payments, and to enforce implement of the various obligations which have hitherto been exigible either by the Church or by particular parishes. Moreover, they have power to allocate in conformity with schemes framed by the Ecclesiastical Commissioners certain Exchequer grants and other sums received from the Treasury, amounting in all to £17,040.

Under the scheme contained in the Sixth Schedule, for the valuation and surrender of teinds, the General Trustees have, where a benefice is vacant, powers corresponding to those of the heritors or of the minister, where the benefice is full, in regard to the initiation and conduct of proceedings for these objects.¹

In course of time, doubtless, the powers and scope of action of the Trustees will be further defined and possibly amplified in some respects by the General Assembly in the exercise of its inherent powers. It may be suggested, however, that the primary conception of the function of the General Trustees seems to be that of a property-holding body representing the Church, in whom the title to Church property generally shall be formally vested for behoof of the Church, its parishes, and organisation; and by whom administration and supervision of the property shall be conducted, and the properties (or their revenues and

Powers in regard to valuation, &c., where benefice vacant.

Function of General Trustees primarily that of holding Church property as representing the Church and its various organisations.

¹ A full and interesting account in fuller detail of the functions of the General Trustees will be found in the Year Book of the Church of Scotland for 1928 at pp. 89-95.

proceeds) made available to the particular organisations by which the work of the Church is carried on. This, it seems to the writers, is, broadly speaking, the ambit of the sphere of usefulness of the General Trustees; and, if this conception be correct, it would seem that any amplification of their powers and responsibilities should not be allowed to extend their duties or responsibilities to dealing with matters other than such as are strictly germane to those primary objects.

PART IV.

CHAPTER XIV.

TEINDS.

AS EXISTING IMMEDIATELY PRIOR TO, AND AS AFFECTED BY, THE PROVISIONS OF THE PROPERTY AND ENDOWMENTS ACT, 1925.

IN the last edition of this book, Part V consisted of a somewhat full historical account of the gradual development of the Law of Tithes, in which was traced its growth throughout Western Europe and England, and in particular its history in Scotland.

For reasons which are sufficiently explained in the preface, it has not been thought necessary in this edition to repeat this account. The great changes which the legislation of 1925 has made in the practical relation of teinds to the parochial ecclesiastical system, and consequently to parochial ecclesiastical law, make it unnecessary for the understanding of the law as now existing to do more than sketch briefly the stages by which the law came to be as it was immediately prior to the passing of the Property and Endowments Act, and to state its principles as it then stood. Those interested in pursuing the history of the law in more thorough detail may resort to the fuller account referred to, which is given in the previous edition. And they, and also those who desire to obtain a concise but comprehensive account of the more salient features of the progress and scope of the law affecting teinds in Scotland, will find materials for this in the recent cases of *Baird v. Lord Wemyss*, 1906, 8 F. 669; *Davidson v. Stuart*, 1919 S.C. 20; *Galloway v. Earl of Minto*, 1920 S.C. 354, and 1922

S.C. (H.L.) 24, and *M'Ewen v. Watt*, 1922 S.C. 203. The judgments of Lord Sands and of Lord Dunedin in the case of *Galloway v. Earl of Minto* especially furnish a singularly learned and exhaustive account of the growth of the law.

Origin of
system of
tithes in
Western
Europe.

For present purposes it is enough to notice that, originating as an ecclesiastical duty alone, the payment of tithes became recognised as a civil obligation under Charlemagne, the laws made by whom were adopted in England. Both on the Continent and in England the Church derived great benefit from the sanction given by the State to the collection of a portion of the year's produce as a contribution to the maintenance of the clergy. With the development of the pretensions of the Papacy, the Church however ceased to depend upon civil rulers for the observance of the duty; and when tithes were introduced into Scotland it was at a stage when the Church felt strong enough to require their payment as a thing recognised by the universal custom of Christendom.

Introduction
into Scotland.

The church law which Queen Margaret and her son David I. introduced into the Scotland of their day was that of Edward the Confessor; and it was necessary to its adoption here that it should be acknowledged as an observance not primarily English, but as one which the whole world owned as binding upon it. Ecclesiastically there was nothing illegal in the Culdaic system. It was indeed irregular according to the rules which were held binding in England; but it was ancient, it was associated intimately with the fortunes of powerful families, and it was familiar to the people. Innovations from the south could not well have been forced upon the nation—such as it was. The part David played was that of the reformer merely. He remodelled existing institutions in so thorough a manner upon an Anglican model that the change which he accomplished well deserves to be known as the First Reformation; but he did so purely as an ecclesiastical statesman who was a true son of

the Church, not as a law-giver. The Culdaic tribal system, excellent in many things, had also many defects—some of them almost necessarily incidental to clan government; and David may well have thought that by his work in modifying the existing institutions, and in introducing not only the regular government of dioceses but the monastic orders in their second Anglican form, he was doing much not only to forward religion—an object always very dear to him—but to settle the country. Every gift of land to bishop or monastery meant so much the more territory safe from occupation by the territorial subject-lords, who were always the chief dangers of a Scottish king. It was a great protection to such a sovereign, both as ecclesiastical reformer and politician, to work out his remedial measures for Church and State, not under any law of his own devising, but with the sanction of laws which knew no national limits and which were accepted as obligatory by all who look to Rome as the seat of Christ's Vicegerent. On the other hand, the Anglican Church as introduced into Scotland was distinctly an intruder, and willingly welcomed the protection of the king (as Leo had welcomed that of Charlemagne or John XII. had welcomed that of Otto), and acknowledged his authority as readily as it owned his piety.

Under David's successors until the Wars of the Succession things went well enough, although the Crown had for the most part only substituted for one system of tribal churches another. Nothing is so permanent as a corporation; and while a family might rise to great power in one of its sons and sink with another, most of the monasteries steadily advanced in prosperity. During the wars of Wallace and Bruce, and the long minorities of the Stuarts, this was very evident; and, when James V. died, the Church had for long been independent of civil authority, and lived under a law of her own, too strong to need aid from the uncertain and brief power of any king. Power

Constitution
during
Roman
Catholic
period.

and wealth brought their own abuses, and during the long and troublous times of the Second Reformation the Church and her lands and her tithes fell a prey to the civil power which latterly she had generally, though not consistently, ignored.

Effect of the Reformation on tithe system.

The Church of the Reformers had no David at its head. Save in Knox's brain, no bold reconstruction of the old Church on new lines was conceived, still less brought to accomplishment. The Culdees had been reorganised. The Church of Beaton was simply submerged. And what the Reformers succeeded in preserving was no more than salvage from the wreckage that floated on the surface of a turbulent river.

Action of Charles I. in regard to teinds.

That in the long run the tithes, or a portion of them, were saved to the Church on a business plan through the policy of Charles I. does not seem to have been in any way due to his desire to assist the Church. His motive in carrying out the systematic valuations of teinds was to secure a provision to himself by the tax or burden called King's-annuity, and was as unconcealed as was his grandmother's bold demand to the prelates of her day to surrender one-third of their benefices for her privy purse. (Cf. narrative in Lord Sands' judgment in the *Minto* case, 1920 S.C. 354, at p. 366.) The history of the King's-annuity may be told in a few words. It was fixed in 1627. Charles subsequently assigned it to James Livingstone, Groom of his Bedchamber, in security of a debt of £10,000. It came by-and-by into the hands of the Earl of Loudoun, and in 1674 it was stopped by royal warrant.¹ It is still allowed as a deduction from the price of teinds in actions of valuation and sale, but it is purely fictitious.

The "King's annuity."

Out of Charles's selfish legislation came much good both to the Church which collected, and the heritors who paid, teinds. The clergy were secured in payment of stipends by those being localised, or fixed

¹ See Stair, "Institutions," bk. ii. tit. viii. 13.

upon the teinds of the localities where they served their cures; and the heritors were afforded a ready way of ridding themselves, if they pleased, of the payment of teinds to others than ministers with such localised stipends, by purchasing their teinds, after valuation, at fixed rates. Thus the tithes once again came under the direct recognition of the civil authority of the sovereign, as in the days of Charlemagne and of Edgar.

At the present day all lands in Scotland are liable in payment of teind except (1) glebes (even though feued), (2) lands held by heritors with titles which bear to be *decimis inclusis*, (3) lands of which the heritors have purchased the teinds (except as regards stipends localised on them), and (4) Crown lands—but Crown lands, if sold to subjects, become liable for teinds, and teind-paying lands, once held by a subject, continue to be liable for teinds when purchased by the Crown.

All teinds in Scotland belong (1) to the Crown, Ownership of teinds. which draws the bishops' teinds, *or* (2) to burghs for pious uses, *or* (3) to universities, *or* (4) to titulars, *or* (5) to tacksmen, *or* (6) to patrons, *or* (7) to the proprietors of lands who have purchased their teinds *or* who hold their lands under titles *cum decimis inclusis*, *or* (8) to parish clergymen to whom they (having been valued) have been surrendered, and who hold them, as they hold their manses, for life, *or* during their incumbency.

All teinds might be valued by the Commissioners of Teinds on the application of (1) the heritor liable in payment, *or* (2) the person entitled to receive the teind, *or* (3) the minister of the parish in which the teind-bearing land is situated. And now under sec. 16 of the Property and Endowments Act, 1925, and relative Schedule (VI.), by which valuation will for the future be regulated, the General Trustees are, where a benefice is vacant, included among those who may pursue a valuation.

Bishops' teinds, teinds held by burghs for pious purposes, or by universities, cannot be compulsorily purchased. Teinds (1) in the possession of titulars or tacksmen might be bought at nine years' purchase, and (2) teinds in the possession of patrons at six years' purchase, in each case allowance being made in the purchasing heritor's favour for King's-annuity. Bishops' teinds (3) are sold by the Crown at such price as the Commissioners of Woods and Forests may fix, say from eleven to eighteen years' purchase.²

By sec. 18 of the Property and Endowments Act it is provided that—

Notwithstanding anything contained in the Act of the Scots Parliament, 1693, c. 23 (an Act renewing the Commission for the Plantation of Kirks and valuation of teinds), or in any other enactment, or in any charter, grant, or deed, it shall be lawful after the passing of this Act for the titular or any other person having right of titularity to sell surplus teinds on such terms as may be agreed upon between him and the heritors. Nothing in this section shall prejudice or affect the provisions of the Acts of the Scots Parliament, 1633, c. 17 (anent the rate and price of teinds), and 1690, c. 23 (concerning patronages), or any other enactment at present in force authorising the sale of surplus teinds.

The result of this provision seems to be to leave unaffected any right in a heritor to acquire the surplus teinds at the prices hitherto prevailing, while legalising sale at any other price on which he and the titular may agree.

The right of patrons as titulars of teinds was acquired in a curious way. After the Reformation, the patron of a parish, who had at that time no right

Origin of
patron's
right as
titular.

² Or even less. The price depends on the probabilities of allocation for stipend.

to teinds, was entitled (and specially by the Act 1612, c. 1) to make arrangements with the minister as to how much of the teinds the minister should draw, he taking the rest. In Acts of 1649, 1662, and 1690 relative to patronage, the patron's right to such teinds as are not otherwise owned is, subject to the minister's stipend, expressly recognised. This right is *qua* patron, and was given as a compensation in 1649, when patronage was abolished. Patronage was restored, but the patron kept the titularity of teinds he had acquired, and he keeps it still. This is one of the anomalies of the law of teinds.

RELATION OF TEINDS TO STIPEND.

Much of the difficulty which undoubtedly attends this branch of law has been due to popular confusion of *teind* and *stipend*. It is quite common to hear it said, in answer to an inquiry as to what teind means, that teinds are the contributions of the land-owning classes to the upkeep of the Church of Scotland. However true this once may have been, it is not true now; for whether the Church existed or did not exist, teinds would continue to be paid; and stipend is rather an inseparable burden on teinds than teind an equivalent term for stipend. This it has never been since the Reformation, and seldom was before that time.

The law may be more clearly stated thus—Teinds are a property which, with certain exceptions, may be sold like feu-duties, but, unlike other property, were subject to the chance, at intervals of not less than twenty years, of the amount receivable by those owning them being affected by the Court of Teinds allowing the minister of the parish an increase or augmentation of his stipend from such teinds.

Teinds are not a *burden* on lands. As Lord Teinds or President Inglis said in *Duff v. The Earl of Seafield*, separate estate not a burden on lands. 1883, 11 R., at p. 141: "Some confusion in argument is always introduced by looking upon

teinds as a burden upon lands. Teinds are not a burden upon lands. They are a separate estate; although, it may be added, a separate estate liable to diminution, contingent on certain circumstances of a nature more or less essentially periodic." Stair gives his definition as follows: as "of a burden *affecting* lands, and the profits thereof, and *being also a distinct right from the 'lands.'*"³

Stipend as
inherent
burden on
teinds.

The stipend is an inherent burden on the teinds. Lord Robertson, in the case of Prestonkirk, 1846, 9 D. 61, observed: "The rule *decimæ debentur parochæ* never took place with us in its full extent; but all our lawyers lay it down that teinds, in whatever hands they may be, or under whatever title they may be possessed, are never held as absolute property, but are at all times subject to the burden of a suitable provision to the minister. This burden *inhæret ossibus*, and is in the eye of law perfectly inseparable from the teinds. This I consider is a fundamental proposition in the law of teinds. It is laid down as such by all our lawyers. It is a proposition which is universally true, and which admits of no exception nor limitation whatever."

VICARAGE TEINDS.

While from time to time reference has been made to vicarage or lesser tithes, attention in the preceding pages has been chiefly directed to rectorial or greater tithes. Vicarage tithes, indeed, continued to be paid after the Reformation and are still calculable when they are traced; but the right to them is lost by disuse for forty years, while the right to parsonage or rectorial teinds is not lost by desuetude. Whales were teinded among vicarage tithes, and certain salmon-fishings have been held to be subject to valuation.⁴

Fish teinds.

Berwickshire fish teinds were commuted by the Act 27 & 28 Vict. c. 23, and a similar claim as

³ "Institutions," bk. ii. tit. viii., p. 6.

⁴ Elliot, "Teind Court Procedure," p. 76.

regards Leith by 55 & 56 Vict. c. 177.⁵ Vicarage teinds seem to have been generally, if not always, local; so that the canon rule *decimæ debentur parochæ* applied more really than in the case of the parsonage teinds. While teinds were defined by the canonists to be of three classes—*personal*, as of profits of personal industry; *prædial*, as of the natural fruits of the ground or water; and *mixed*, the industrial fruits of the ground only, personal teinds are (as noted *supra*) very rarely mentioned in Scottish records. Stair says: “Our custom alloweth of no personal teinds” (“Institutions,” bk. ii. tit. viii. 6).

In concluding this account of teinds, it will be noticed that, had the valuations introduced by Charles I. been carried out all over the kingdom, the position of parties would have been very different from what it now is. At the present day there may be in one parish: (1) lands not liable in payment of teinds, as held under titles *cum decimis inclusis*; (2) lands of which the teinds were valued in the reign of Charles I., and then purchased, and lands of which the teinds were valued at any time from 1627, but have not been purchased; (3) lands of which the teinds were, say, last year valued and purchased on calculations based on a very different rental; (4) lands of which the teinds have never been valued. It is highly desirable that the valuation of all teinds should be completed as speedily as possible, whether they are purchased or not. Until such a valuation is made, it is quite impossible to say what the value of the teinds of Scotland is. It is, perhaps, little surprising that there should be much popular misconception as to when tithes are payable. They are not universal over Scotland in the sense that all lands are in the same position as regards tithe-paying. They are not of fixed or equal proportions relatively to the rental of lands or their productiveness. In some parishes the

⁵ As to fish teind, see *Juridical Review*, 1892, vol. iv., p. 63.

teinds are exhausted, in others they are not. There is, in short, no possibility of laying down any general proposition relative to teinds which will be at once adequate and easily intelligible. When we look at the payment of tithes as conceived by the Early Christian Church, on the one hand, and on the other at the complicated machinery which in Scotland to-day is supposed to work out results similar, as regards the maintenance of clergy, to those sought to be obtained by that primitive Church, something little short of despair seizes the mind of any one who attempts to explain the historical relationship of the one to the other. Without historical inquiry the modern law of teinds is incomprehensible, and even with the aid of history it requires patience and some study to arrive at an explanation of the curious anomalies with which that law presents us.⁶

The peculiarly parochial aspects of this complicated branch of the law are principally those arising out of its relation to stipend. In the chapter dealing with stipend there have incidentally been explained the provisions of the Property and Endow-

⁶ The following books will be found useful by those who desire to pursue the study of teinds further:—

Acts of the Lords Auditors of Causes and Complaints, 1468-1494 (Record Publications: Scotland), 1839.

Bellesheim, Alphonse, "History of the Catholic Church in Scotland," ii. 1887, iii. 1889.

Buchanan, Wm., "Treatise on the Law of Scotland on the subject of Teinds or Tithes," 1863.

Bryce, Jas., "The Holy Roman Empire" (7th edn.), 1880.

Connell, Sir John, "A Treatise on the Law of Scotland respecting Tithes," 1815.

Elliot, Nenion: (1) "Teinds or Tithes and Procedure in the Court of Teinds in Scotland," 1893; (2) "Teind Papers," 1874.

Freeman, Edw. A., "History of the Norman Conquest in England" (2nd edn.), 1870, vol. i.

Froude, J. A., "Annals of an English Abbey," in "Short Studies on Great Subjects," vol. iii., 1888.

Innes, Cosmo, "Origines Parochiales Scotiæ," 1851-55.

„ „ „Lectures on Scotch Legal Antiquities," 1872.

„ „ „Sketches of Early Scotch History," 1861.

Kirkwood, Anderson, "On the Law of Teinds in Scotland," Art. in *Journal of Jurisprudence*, vol. xvi., 1872.

ments Act, 1925, by which the association which has hitherto existed of stipend with teinds will be practically severed when these provisions have been worked out to their full extent. There will emerge as a necessary step in the course of working out this severance a TEIND ROLL prepared in terms of sec. 11 of the Act for every parish in Scotland in which it is directed that there shall be specified in sterling money the following particulars:—

Act of 1925
provides for
teind roll
for every
parish.

- (a) The total teind of the parish; and
- (b) The amount of that total applicable to the lands of each heritor; and
- (c) The value of the whole stipend payable to the minister so far as payable out of teinds, including vicarage teinds payable as stipend and surrendered teinds so payable; and
- (d) The proportion of that value payable by each heritor in the parish.

Under sub-sec. (2) of the same section, the said teind roll shall be prepared and issued as soon as may

Milton, John, "Considerations touching the likeliest means to remove Hirelings out of the Church, wherein is also Discourse of Tithes, &c."

Robertson, E. William, "Scotland under her Early Kings," 2 vols., 1862.

Robertson, E. William, "Historical Essays in connection with the Land, the Church, &c.," 1877.

Robertson, Jos., "Scottish Abbeys and Cathedrals," Art. in *Quarterly Review*, lxxxv., 1849.

Selborne, Earl of, "Ancient Facts and Fictions concerning Churches and Tithes," 1888.

Selden, John, "The Historie of Tithes," 1618.

Skene, W. F., "Celtic Scotland," vol. ii., "Church and Culture," 1877.

Spotswood, J., "History of the Church and State in Scotland" (4th edn.), 1677.

Stair, Lord, "Institutions of the Law of Scotland," ed. by J. S. More, 1832.

Story, Very Rev. R. H., D.D., "The Church of Scotland Past and Present," N.D.

Stubbs, Bishop, "Constitutional History of England," 3 vols., 1880.

Thorpe, B., "Ancient Laws and Institutes of England," vol. i., 1840.

be practicable, and the provisions of the Fifth Schedule to the Act (see Appendix I., p. 579) shall have effect with regard to the preparation, issue, and adjustment of the teind rolls. In regard to these matters, the Court of Session is empowered to make from time to time by Act of Sederunt rules of procedure and, with the approval of the Treasury, such rules and regulations as may in the judgment of the Court be necessary to regulate the amount of the fees to be paid to the clerk of teinds in connection with these matters. An Act of Sederunt dealing with procedure in proceedings under sec. 4 was passed on 28th October, 1925, and is printed in Appendix III. at p. 607. The rules of apportionment of expenses among the heritors concerned have already been explained (*supra*, Chaps. II. and X.).

Standardised stipend or equivalent charge deductible in accounting for teinds from which exigible.

Under sec. 17 the heritor of any lands from the teinds of which a standardised stipend or any part thereof is exigible is declared to be entitled, in any accounting in respect of those teinds with the titular thereof, to deduct the amount of the standardised stipend exigible from those teinds, or the amount of any standard charge coming in place of such stipend or any part thereof, and that whether or not such stipend or part thereof, or standard charge, has been redeemed or extinguished.

APPENDICES.

APPENDIX I.

I. STATUTES AFFECTING THE CHURCH OF SCOTLAND PASSED SINCE 1st JANUARY, 1900,

SO FAR AS BEARING ON

PAROCHIAL ECCLESIASTICAL LAW.

[The figures in the margin refer to the pages in the book at which the particular sections, &c., are noticed—the more important being in heavier type.]

(i) THE ECCLESIASTICAL ASSESSMENTS (SCOTLAND) ACT, 1900.

63 & 64 Vict. c. 20 (30th July, 1900).

An Act to amend the Law regarding Ecclesiastical Assessments in Scotland.

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. Where in any parish it shall be necessary to impose an ecclesiastical assessment which, according to previous use and wont in the parish, would fall to be imposed according to the valued rent, but which it would be competent to impose according to the real rent, it shall be lawful for any valued rent heritor to request the clerk to the heritors to summon a meeting of valued rent heritors in the manner prescribed by section twenty-two of the Ecclesiastical Buildings and Glebes (Scotland) Act; and if at such meeting it is resolved by a majority of not less than two-thirds in value of valued-rent heritors, voting personally or by proxy, that the amount shall be imposed according to the valued rent, then such assessment shall be imposed according to the valued rent, any law to the contrary notwithstanding.

When assessment to be on valued rent. 59, 72, 80 et seq., 119 et seq., 357.

31 & 32 Vict. c. 96.

81.

2. When it has been resolved to levy an assessment in any parish according to the real rent, intimation of such resolution shall be made to the presbytery of the bounds and to the kirk-session of such parish, and thereafter a scheme showing the heritors proposed to be assessed and the amount of their respective assessments shall be made up,

Inspection, &c., of scheme of assessment on real rent. 87 et seq., 117, 492, 493.

and shall be open, free of charge, to inspection by any heritor or other party interested for a period of at least thirty days at some convenient place in the parish, and intimation of the place where, and the period for which, the scheme is to be open to inspection, and the amount proposed to be levied on the heritor to whom it is sent shall be made by circular-letter sent by their clerk to all the heritors prior to the commencement of such period.

Exemptions
from assess-
ment on real
rent. 492.
[Superseded
by sec. 28 (6)
of the Church
of Scotland
Act, 1925,
quod vide.]

3. From and after the commencement of this Act, whenever any ecclesiastical assessment is imposed upon lands and heritages in any parish in Scotland according to the real rent thereof—

(1) No part of such assessment shall be imposed or levied upon lands and heritages occupied solely as the church and accessory buildings or burying-ground attached of any religious body in Scotland, or as the dwelling-house with offices, or garden or glebe land attached, of the minister of such church; and

89, *infra*,
563, 90.

(2) The rental on which each heritor shall be assessed shall be his total rental within such parish as appearing in the valuation roll (whether such rental consists of one or more subjects), but subject to deduction of the sum of fifty pounds when the amount of the deficiency which would be created in the total amount of the assessment by allowing such deduction to every heritor has been paid to the collector of the assessment by the kirk-session :

119.

Provided always that no heritor, who by reason of any exemption or deduction allowed by this section is relieved altogether from assessment in respect of the execution of any work, shall be entitled at any meeting of heritors to take part in the discussion of, or to vote upon, any question concerning any plans for or the execution of the said work, or the defraying of the expenses of the same.

Definitions.

31 & 32 Vict.
c. 96.

4. In this Act, except where inconsistent with the context, expressions have the meaning attached to them in the Ecclesiastical Buildings and Glebes (Scotland) Act. The expression “ecclesiastical assessment” means an assessment for any of the purposes mentioned in section 20. twenty-three of the said Act. The expression “valued-rent heritor” means a heritor liable to contribute to ecclesiastical assessments where the same are imposed

according to the valued rent. The expression "real-rent heritor" means a heritor liable to contribute to ecclesiastical assessments where the same are imposed according to the real rent.

5. This Act may be cited as the Ecclesiastical Assessments (Scotland) Act, 1900, and shall commence to have effect from and after the first day of January one thousand nine hundred and one. Short title and commencement of Act.

[NOTE.—Under sec. 28 (6) of the Church of Scotland (Property and Endowments) Act, 1925, *infra*, p. 563, the provisions therein enacted come in place of those of sec. 3 of this Act.]

(ii) THE CHURCHES (SCOTLAND) ACT, 1905.

5. Edw. VII. c. 12 (11th August, 1905).

An Act to provide for the Settlement of certain Questions between the Free Church and the United Free Church in Scotland and to make certain amendments of the law with respect to the CHURCH OF SCOTLAND.

WHEREAS . . . it is expedient to amend the law relating to the subscription of the Confession of Faith by Ministers of the Church of Scotland and others,

BE it enacted, &c.

(Secs. 1 to 4 deal with matters affecting the Free Church and the United Free Church.)

Sec. 5. FORMULA OF SUBSCRIPTION TO THE CONFESSION OF FAITH IN THE CHURCH OF SCOTLAND.—The formula of subscription to the Confession of Faith required from ministers and preachers of the Church of Scotland as by law established, and from persons appointed to Chairs of Theology in the Scottish Universities and the Principal of St. Mary's College, Saint Andrews respectively, shall be such as may be prescribed by Act of the General Assembly of the said Church with the consent of the majority of the Presbyteries thereof. The formula at present in use in any case shall be required until a formula in lieu thereof is so prescribed.

Sec. 6.

(2) The Acts specified in the Second Schedule to this Act are hereby repealed to the extent specified in the third column of that schedule, both as originally enacted, and as incorporated, ratified, confirmed or approved by any other Act.

(3) This Act may be cited as the Churches (Scotland) Act, 1905.

SECOND SCHEDULE.

ENACTMENTS REPEALED (SEC. 6).

Act.	Title.	Extent of Repeal.
An Act of the Parliament of Scotland passed in the year one thousand six hundred and ninety-three.	Act for settling the quiet and peace of the Church.	The words "the same to be the confession of his faith, and that he owns the doctrine therein contained to be the true doctrine which he will constantly adhere to as."
An Act of the Parliament of Scotland passed in the year one thousand seven hundred and seven.	An Act for securing the Protestant religion and Presbyterian Church Government.	The words "do and shall acknowledge and profess and," and the words "as the confession of their faith."

[*Cf. the Church of Scotland Act, 1921, infra, No. iii.*]

(iii) THE CHURCH OF SCOTLAND ACT, 1921.

11 & 12 Geo. V. c. 29 (28th July, 1921).

Preface v,
vi; 34, 96,
463, 464.

An Act to declare the lawfulness of certain Articles declaratory of the Constitution of the Church of Scotland in matters spiritual prepared with the authority of the General Assembly of the Church.

WHEREAS certain articles declaratory of the constitution of the Church of Scotland in matters spiritual have been prepared with the authority of the General Assembly of

the Church, with a view to facilitate the union of other Churches with the Church of Scotland, which articles are set out in the Schedule to this Act, and together with any modifications of the said articles or additions thereto made in accordance therewith are hereinafter in this Act referred to as "the Declaratory Articles":

And whereas it is expedient that any doubts as to the lawfulness of the Declaratory Articles should be removed:

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. The Declaratory Articles are lawful articles, and the constitution of the Church of Scotland in matters spiritual is as therein set forth, and no limitation of the liberty, rights and powers in matters spiritual therein set forth shall be derived from any statute or law affecting the Church of Scotland in matters spiritual at present in force, it being hereby declared that in all questions of construction the Declaratory Articles shall prevail, and that all such statutes and laws shall be construed in conformity therewith and in subordination thereto, and all such statutes and laws in so far as they are inconsistent with the Declaratory Articles are hereby repealed and declared to be of no effect.

Effect of
Declaratory
Articles.
464.

2. Nothing contained in this Act or in any other Act affecting the Church of Scotland shall prejudice the recognition of any other Church in Scotland as a Christian Church protected by law in the exercise of its spiritual functions.

Other
Churches
not to be
prejudiced.

3. Subject to the recognition of the matters dealt with in the Declaratory Articles as matters spiritual, nothing in this Act contained shall affect or prejudice the jurisdiction of the civil courts in relation to any matter of a civil nature.

Jurisdiction
of civil
courts.

4. This Act may be cited as the Church of Scotland Act, 1921, and shall come into operation on such date as His Majesty may fix by Order in Council¹ after the Declaratory Articles shall have been adopted by an Act of the General Assembly of the Church of Scotland with the consent of a majority of the Presbyteries of the Church.²

Citations and
commence-
ment.
35, 596, 599.

¹ See Order in Council of 28th June, 1926, *infra*, p. 599.

² See Act of General Assembly of 3rd June, 1926, *infra*, p. 596.

SCHEDULE.

ARTICLES DECLARATORY OF THE CONSTITUTION OF THE
CHURCH OF SCOTLAND IN MATTERS SPIRITUAL.

[The articles in the Schedule are incorporated verbatim in the Act of General Assembly of 3rd June, 1926, and as this is printed in full at p. 596, *infra*, it is unnecessary to give the Articles here' also.]

Preface
v-viii; 34.

(iv) CHURCH OF SCOTLAND (PROPERTY AND
ENDOWMENTS) ACT, 1925.

15 & 16 Geo. IV. c. 33 (28th May, 1925).

An Act to amend the law relating to Teinds and to the Stipends of Ministers of the Church of Scotland, and the tenure of the Property and Endowments of that Church, and for purposes connected therewith.

GENERAL ARRANGEMENT.

(A more detailed note of the contents of sections is prefixed to each Part of the Act.)

Part I. Stipend and Teind.

Part II. Scottish Ecclesiastical Commissioners.

Part III. Transfer of Parish Churches, Manses, Glebes and Churchyards.

Part IV. General.

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I.

STIPEND AND TEIND.

Arrangement of Sections.

97 *et seq.*,
418 *et seq.*,
441-442.

Section

1. Stipend to be payable only in money.
2. Standard value of victual stipend.
3. Date of standardisation of stipend.
4. Standardisation by election.

Section

5. Standardisation by notification.
6. Collegiate charges.
7. Vesting of standardised stipend.
8. Payment of standardised stipend.

Arrangement of Sections—continued.

Section	Section
9. Provisions as to ann.	15. Extinction of liability for stipend not exceeding one shilling.
10. Augmentation of stipend.	16. Valuation and surrender of teinds.
11. Teind rolls.	17. Deduction of stipend in question with titular.
12. Charge to be substituted for liability for stipend exceeding one pound.	18. Sale of surplus teinds.
13. Allocation of standard charge.	19. Provisions as to certain payments out of the Consolidated Fund.
14. Provisions where stipend exceeds one shilling but does not exceed one pound.	

1. Subject to the provisions of this Act, every stipend which in any way or to any extent depends upon fluctuations in the price of victual (hereinafter in this Act referred to as "victual stipend") shall cease so to depend, and shall be payable only in money at the standard value thereof as hereinafter defined. Stipend to be payable only in money. 418 *et seq.*, 420, 441, 442.

The substitution of the standard value of a victual stipend for the value thereof according to the present law and practice is hereinafter in this Act referred to as the "standardisation" of the stipend and the expressions "standardised" and "date of standardisation" have corresponding meanings.

2.—(1) The value in money of victual stipend shall for each county in Scotland be determined by adding to the former county average value of the different kinds of victual in which such stipends are localised an increase of five per centum of that average value, and for the purposes of this section the former county average value of any kind of victual shall be deemed to be the average value of that kind of victual for that county for the fifty years 1873 to 1922, as ascertained— Standard value of victual stipend. 421 *et seq.*, 442, 509.

(a) In the case of the kinds of victual mentioned in the First Schedule to this Act, by reference to the values set out therein, or where for any county the value of any such kind of victual is not so set out, then by reference to the value of such other kind of victual for that county or to the value of the same kind of victual for such other county or counties as the Court of Session may select, and by Act of Sederunt prescribe, as being most suitable in the circumstances of the case; and

(b) In the case of any kind of victual not mentioned in the First Schedule to this Act, in accordance with the provisions set out in the Second Schedule to this Act. 423.

422, 424, 509. (2) In the application of the foregoing provisions of this section to a particular parish, regard shall be had to any special method of calculation of stipend customary in that parish (including calculation of a stipend localised in Bear by reference to the fiars price for first or second Barley), and the sheriff may give such instructions to the Clerk of Teinds as he may deem to be necessary or proper for this purpose upon application made to him by any minister or presbytery or heritor concerned at any time before the expiry of six months after the date of standardisation. If no such application is then made in respect of any parish, this subsection shall not have effect with respect to that parish. Intimation of any such application shall be made to such persons as the sheriff may appoint. The decision of the sheriff shall be final unless an appeal therefrom shall be taken to the Lord Ordinary by the applicant or by any person appearing in the application in manner provided by the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868, with respect to appeals from the sheriff to the Lord Ordinary under that Act, and the provisions of that Act relating to such appeals shall, with the necessary modifications, apply to appeals under this subsection, and the clerk to the process in appeals under this subsection shall be the Clerk of Teinds.

31 & 32 Vict.
c. 96.

424. (3) The value in money of any victual stipend, as the same may be determined under subsection (1) of this section subject to any variation under subsection (2) thereof along with the value of any money stipend is in this Act referred to as the "standard value" of that stipend.

Date of
standardi-
sation of
stipend.

99 *et seq.*, 424.

3. The date of standardisation of a stipend shall be the term of Martinmas which shall first occur not less than six months after the date when the benefice becomes actually vacant or is deemed to have become vacant by election or by notification as hereinafter provided. In the case of a benefice which is actually vacant at the passing of this Act the date of standardisation shall be the term of Martinmas, nineteen hundred and twenty-five.

The words "becomes actually vacant" shall not include the occasion where a minister is succeeded by an assistant and successor appointed to him before the passing of this Act, but shall include the occasion where a minister is succeeded by an assistant and successor appointed to him after such passing.

Standardi-
sation by
election.

426, 427, 456.

4. Any minister who at the passing of this Act is entitled to a victual stipend may elect that the stipend shall be standardised, and if he so elects he shall intimate his election in writing in the form set forth in the Third

Schedule to this Act or in a similar form to the heritors 507. to the clerk of the presbytery and to the General Trustees, and in such case the benefice shall for the purposes of this Act be deemed to have become vacant by election at the date of the said intimation.

Where at the passing of this Act an assistant and successor has been appointed to a minister entitled to a victual stipend, either the minister or the assistant and successor with the consent of the assistant and successor or of the minister (as the case may be), or failing such consent with the authority of the presbytery may elect and intimate his election as aforesaid.

5.—(1) It shall be lawful for the General Trustees to Standardi-
intimate in writing to the minister of any parish who is entitl-
entitled to victual stipend and to the clerk of the presby-
tery and to the heritors that the victual stipend is to be
standardised and in such case the benefice shall for the
purposes of this Act, but subject as hereinafter in this
section provided, be deemed to have become vacant by noti-
fication at the date of the said intimation: Provided that
the General Trustees before making such intimation shall
have given to the minister an undertaking that (notwith-
standing such standardisation) the amount of his stipend
according to the present law and practice will continue
to be paid to him by the General Trustees until he ceases
to be minister of the parish and that the right (if any) of
his widow or other representatives to Ann will, in the
event of his death, be satisfied, and the obligations con-
tained in any such undertaking shall be duly fulfilled by
the General Trustees, who shall be indemnified by the
General Assembly to such extent (if any) as may be neces-
sary having regard to the amount of money at the disposal
of the Trustees for that purpose: Provided always that if
at any time during the currency of such an undertaking
the minister intimates to the General Trustees in terms of
the section of this Act relating to standardisation by elec-
tion, his election that his stipend should be standardised,
such intimation shall have effect as in that section provided
and the undertaking shall cease to operate.

(2) In the application of the foregoing subsection to a 371, 425, 428.
benefice where an assistant and successor has been appointed
to the minister before the passing of this Act, the word
“minister” shall include and refer to that assistant and
successor as well as the minister: Provided that the under-
taking to be given by the General Trustees to the assistant
and successor shall include his interest in the stipend so
long as he remains assistant and successor as well as after
he succeeds the minister should that event occur, but shall
not include any right with respect to Ann.

Collegiate
charges.
429 *et seq.*

6. With respect to a parish where separate benefices exist and both the ministers are entitled to victual stipend, except where in such parish there are no surplus teinds, the foregoing provisions of this Act shall have effect subject to the following modification, namely, that neither of the benefices shall be deemed to be or to become actually vacant or to have become vacant by election or notification, unless the other benefice was actually vacant at the passing of this Act, or shall thereafter have become actually vacant or been deemed to have become vacant by election or notification.

Vesting of
standard-
ised stipend.
431 *et seq.*

7. Any stipend which has been standardised under the provisions of this Act shall as on and from the date of standardisation vest *de die in diem* in the minister entitled thereto without prejudice to the payment of any stipend vested in him or in any former incumbent of the benefice according to the present law and practice and subject to the satisfaction of any claim for Ann on the part of the widow or other representatives of a deceased incumbent: Provided that in the case of a benefice which is deemed to have become vacant by notification the foregoing provision shall not have effect unless and until the benefice becomes actually vacant or is deemed to have become vacant by election.

Payment of
standard-
ised stipend.
99 *et seq.*,
419, 432 *et
seq.*

8.—(1) As from the date of standardisation any stipend which has been standardised under the provisions of this Act shall be payable by the heritors to the General Trustees half-yearly at the terms of Whitsunday and Martinmas each half-yearly payment being in respect of the half-year preceding the date of payment subject to the following exceptions, namely—

- (a) that the first half of the standardised stipend for the year beginning on the date of standardisation shall not become payable until the term of Lammas in that year; and
- (b) that the second half of the standardised stipend for that year shall not become payable till the term of Candlemas in the following year.

(2) Where as hereinafter in this Act provided the standard value of the stipend as shown by the teind roll is constituted a real burden or has been redeemed or extinguished as the case may be, the provisions of this section shall cease to have effect, and with respect to payments under this section due or payable before that event, the General Trustees shall have all the powers of recovery which according to the present law and practice a minister has with respect to his stipend.

9.—(1) Neither the widow nor any other representative of any minister admitted after the passing of this Act to any benefice in the Church of Scotland shall be entitled to Provisions as to Ann. 455 et seq.
Ann.

(2) The foregoing provisions shall, so far as respects any right in name of Ann to any stipend standardised under the provisions of this Act, apply to the widow and other representatives of any minister admitted before the passing of this Act where the benefice is deemed to have become vacant by election and the minister survives the date of standardisation by one year or more. 456.

(3) Save as in this Act expressly provided, nothing contained therein shall affect or be construed to affect the right which the widow or other representatives of a deceased minister has or have by the present law and practice to one half year's stipend in name of Ann.

10.—(1) On the passing of this Act the present law relating to augmentation of stipend shall cease to have effect without prejudice to any application for augmentation competently made before such passing or to anything following on such application or done therein. Augmentation of stipend. 369, 403, 443 et seq., 519.

(2) The minister or the General Trustees as the case may be to whom a stipend or a standardised stipend is payable may—

- (a) if not less than twenty years shall have elapsed since the date of the last application for augmentation of the stipend; or
- (b) upon the expiry of twenty years from the date of the last application for augmentation of the stipend or upon the expiry of ten years from the passing of this Act, whichever of these two events shall first occur;

apply to the Lord Ordinary to find whether there are surplus teinds available for an augmentation. No such application may be made after the expiry of eleven years from the passing of this Act.

(3) If the Lord Ordinary (whose decision shall be final and not subject to review) finds that there are surplus teinds so available, the minister or the General Trustees, as the case may be, shall be entitled to receive as from the first term of Martinmas following the date of the application an augmentation according to the following scale:—

- (a) Where the stipend as last modified by the Court of Teinds does not exceed twenty-five chalders, an augmentation of six chalders; and
- (b) Where the stipend as so modified exceeds twenty-

five chalders but is less than thirty chalders, an augmentation of five chalders; and

- (c) Where the stipend as so modified is thirty chalders or upwards, an augmentation of four chalders.

The foregoing augmentation of six, five or four chalders, as the case may be, shall be converted and localled in sterling money according to the standard value, the order of allocation being in accordance with the present practice.

If the amount of the available surplus teinds as ultimately ascertained in the localling of the augmentation among the heritors is insufficient to meet the foregoing augmentations, the augmentation shall be limited to the amount so ascertained.

519. (4) As from the date when a minister or the General Trustees, as the case may be, becomes or become entitled to an augmentation under this section, the amount of the augmentation shall be added to the stipend and shall be payable and recoverable in like manner.

(5) The provisions set out in the Fourth Schedule to this Act shall have effect with respect to augmentations under this section and any decree of locality following thereon.

446. (6) An augmentation under this section shall come in place of all future rights of augmentation and shall be final.

(7) In the event of the Lord Ordinary finding that there are no surplus teinds available for an augmentation, neither the minister nor the General Trustees shall be entitled to make any further application.

(8) In the application of this section to a parish where separate benefices exist and both ministers are entitled to virtual stipend—

- (a) the expression “ the date of the last application for augmentation of the stipend ” shall, in cases where applications for augmentation were last made at different dates, mean the later of those dates; and

- (b) the expression “ the stipend as last modified by the Court of Teinds ” shall mean the stipend of each or either of the two benefices taken separately.

Teind rolls.
100, 369, 434
et seq., 509,
533.

11.—(1) There shall be prepared by the Clerk of Teinds for every parish in Scotland a teind roll specifying in sterling money—

- (a) The total teind of that parish; and
(b) The amount of that total applicable to the lands of each heritor; and
(c) The value of the whole stipend payable to the minister, so far as payable out of teinds includ-

ing vicarage teinds payable as stipend and surrendered teinds so payable; and

- (d) The proportion of that value payable by each heritor in the parish.

(2) The said teind rolls shall be prepared and issued as 533. soon as may be practicable, and the provisions of the Fifth Schedule to this Act shall have effect with respect to the preparation, issue, and adjustment of the teind rolls.

(3) The Court of Session shall make by Act of Sederunt, with the approval of the Treasury, such rules and regulations as may in the judgment of the Court from time to time be necessary to regulate the amount of the fees to be paid to the Clerk of Teinds in connection with the preparation, issue, and adjustment of the teind rolls and the time and place of the payment of the said fees. The expenses of the preparation, issue and adjustment of the teind roll, including where a state of teinds is necessary the expense of the preparation thereof, shall be apportioned among the heritors (including any heritors whose teinds have been valued and surrendered before the date of standardisation) in proportion to the amount of the total teind applicable to the lands of each heritor. The share of such expenses apportioned to any heritor, other than a heritor whose teinds have been valued and surrendered as aforesaid shall be payable by such heritor, and the share of such expenses apportioned to any heritor whose teinds have been valued and surrendered as aforesaid shall be payable by the General Trustees.

12. Where the standard value (as shown by the teind roll of a parish) of the stipend exigible from the teinds of any lands of a heritor in that parish which are comprised in one entry in the teind roll exceeds the sum of one pound—

Charge to be substituted for liability for stipend exceeding one pound. 419, 437.

- (1) the amount of such standard value shall by virtue 419. of this Act be constituted as at and from the first term of Whitsunday or Martinmas which shall occur after the date when the teind roll becomes final a real burden (in this Act referred to as the "standard charge") on the lands from the teinds of which the said stipend is exigible in favour of the General Trustees preferable to all other securities or burdens not incidents of tenure;
- (2) the amount of the standard charge shall be pay- 433. able by equal half-yearly instalments at the terms of Whitsunday and Martinmas each half-yearly instalment being in respect of the half year preceding the date of payment and the said instalments shall be recoverable by the

- same means and in the like manner as any feu-duty out of the said lands would be recoverable;
103. (3) the standard charge over any lands may at any time after the completion of the teind roll be redeemed by and in the option of the heritor of those lands or other person liable in respect of the standard charge either (a) for such consideration or in such manner as may be agreed upon between the person liable and the General Trustees, or (b) at any term of Whitsunday or Martinmas after three months' notice either (i) by payment to the Trustees of such a sum as would if invested at the time of payment in Consolidated $2\frac{1}{2}$ per cent. annuities produce an annual sum equal to the standard charge, or (ii) by transfer to the General Trustees of such an amount of Consolidated $2\frac{1}{2}$ per cent. annuities as would produce an annual sum equal to the standard charge;
103. (4) upon the redemption of the standard charge as aforesaid any claim upon the heritor or other person in respect of such standard charge shall cease and be extinguished and the lands from which the same was exigible shall be discharged thereof in all time coming and an entry to that effect shall be made on the teind roll which shall be sufficient evidence of the discharge of the burden.

Allocation of
standard
charge.

438.

13. A standard charge shall from its constitution continue a real burden on the whole of the lands subject thereto, and on every part of those lands notwithstanding any disposition of the lands or any part thereof unless and until intimation of an allocation of the standard charge has been made in writing by the General Trustees and the disponent or his representatives to the Clerk of Teinds, who upon receiving such an intimation shall forthwith make the necessary entry in the teind roll.

If as the result of any such allocation the portion of a standard charge so allocated upon the lands disposed or remaining a real burden on the lands retained by the disponent does not exceed one pound, the disponent or his representatives shall within three months after the date of the entry in the roll redeem the same by payment to the General Trustees of a sum equal to the amount so allocated or remaining a burden multiplied by twenty; and if the portion of the standard charge so allocated or remaining a burden exceeds one pound but is less than fifteen pounds, that portion of the standard charge shall as from

the date of the entry in the teind roll be increased by five per centum.

14. Subject to the provisions of the next succeeding section of this Act, where the standard value (as shown by the teind roll of a parish) of the stipend exigible from the teinds of any lands of a heritor in that parish which are comprised in one entry in the teind roll does not exceed the sum of one pound—

Provisions where stipend does not exceed one pound. 103, 439.

(1) the heritor or other person liable in payment of the said stipend shall redeem the same either

(a) at the first term of Whitsunday or Martinmas which shall occur not less than three months after the date on which the teind roll of the parish becomes final for such consideration or in such manner as may be agreed upon between the person so liable and the General Trustees; or

(b) by payment to the General Trustees at the said term of Whitsunday or Martinmas of a sum equal to the standard value of the said stipend multiplied by eighteen; or

(c) by payment to the General Trustees, along with each half-yearly payment of the said stipend during a period of eighteen years commencing at the said term of Whitsunday or Martinmas, of a redemption instalment equal to seventy-five per centum of the half-yearly payment of the stipend, which redemption instalment shall be recoverable by the General Trustees in the same manner as the half-yearly payment of the stipend:

(2) Upon the redemption of a stipend as aforesaid any claim upon the heritor or other person in respect of such stipend shall cease and be extinguished and an entry to that effect made in the teind roll shall be sufficient evidence of the redemption.

15. Where the standard value (as shown by the teind roll of a parish) of the stipend exigible from the teinds of all the lands of a heritor in that parish, whether those lands are comprised in one or in more than one entry in the teind roll does not exceed the sum of one shilling, any claim for or in respect of the stipend upon the heritor or other person liable in payment thereof (other than a claim for payments already due) shall, notwithstanding any law or practice to the contrary, cease and be extinguished as at the first term of Whitsunday or Martinmas which shall

Extinction of liability for stipend not exceeding one shilling. 106, 441 *et seq.*

occur not less than three months after the date on which the teind roll of the parish becomes final.

Valuation
and surren-
der of teinds.
104, 527.

16.—(1) After the passing of this Act, the provisions set out in the Sixth Schedule to this Act which relate to the obtaining of valuations of teinds and the surrender of valued teinds shall have effect for those purposes and the present law and practice relating thereto shall cease to apply but without prejudice to any proceedings taken before the passing of this Act or to any proceedings which may be taken within three years after the passing of this Act for the approbation of reports of sub-commissioners relating to the valuation of teinds.

(2) Where the annual agricultural value of any lands has been ascertained in accordance with the provisions set out in the said schedule one-fifth part of that value shall be the valued teind of those lands in all time coming.

(3) Where no application for the ascertainment of the annual agricultural value of any lands, the teinds of which have not been valued, is made in accordance with the said provisions and within the period thereby prescribed, the value of such teinds specified in the teind roll for the parish in which the lands are situate shall be deemed to be accepted by acquiescence, and shall be the valued teind of those lands in all time coming.

Deduction of
stipend in
question with
titular.
105, 534.

17. As from the date of standardisation of any stipend which has been standardised under the provisions of this Act, the heritor of any lands from the teinds of which the stipend or any part thereof is exigible shall, in any accounting in respect of those teinds with the titular thereof, be entitled to deduct the amount of the standardised stipend exigible from those teinds, or of any standard charge coming in place of such stipend or any part thereof, whether or not such stipend or part thereof, or standard charge, has been redeemed or extinguished.

Sale of
surplus
teinds.
105, 528.

18. Notwithstanding anything contained in the Act of the Scots Parliament, 1693, c. 23 (an Act renewing the commission for plantation of kirks and valuation of teinds), or in any other enactment or in any charter, grant or deed, it shall be lawful after the passing of this Act for the titular or any other person having right of titularity to sell surplus teinds on such terms as may be agreed upon between him and the heritor.

Nothing in this section shall prejudice or affect the provisions of the Acts of the Scots Parliament, 1633, c. 17 (anent the rate and price of teinds), and 1690, c. 23 (concerning patronages) or any other enactment at present in force authorising the sale of surplus teinds.

19.—(1) The charges and payments described in the Seventh Schedule to this Act and any other payments to or on behalf of the Church or the General Assembly or any committee or institution of the Church or any minister which at the passing of this Act are charged on and payable out of the Consolidated Fund of the United Kingdom shall thenceforth be paid to the General Trustees in such manner as may be directed by the Treasury.

Provisions as to certain payments out of the consolidated Fund. 519.

(2) The Treasury may at any time contract for the redemption of all or any of the payments referred to in the preceding subsection by payment to the General Trustees of such capital sum or sums as may be agreed between the Treasury and the General Trustees.

(3)—(i) The Treasury may from time to time borrow from the National Debt Commissioners and those Commissioners may lend to the Treasury such capital sum or sums as may be necessary for carrying into effect any contract made in pursuance of the immediately preceding subsection.

(ii) For the purpose of repaying any such loan the Treasury may create in favour of the National Debt Commissioners a terminable annuity for a period not exceeding twenty years from the date of the loan to be calculated with interest at such rate as may be agreed.

(iii) Such annuity shall be notified by certificate under the hand of the Comptroller or Assistant Comptroller and the Actuary of the National Debt Office and shall be charged upon the Consolidated Fund of the United Kingdom or the growing produce thereof.

PART II.

SCOTTISH ECCLESIASTICAL COMMISSIONERS.

149, *et seq.*,
212, 520.

Arrangement of Sections.

Section
20. Constitution, powers, and procedure of Scottish Ecclesiastical Commissioners.
21. Orders of Commissioners.
22. Burgh churches.
23. Parliamentary churches and manses.

Section
24. Churches and manses of certain parishes erected under Act of 1844.
25. Endowments in certain parishes *quoad omnia*.

20.—(1) Such persons not exceeding five in number as His Majesty may appoint shall be Commissioners under this Act for the purposes aftermentioned, and shall be styled the Scottish Ecclesiastical Commissioners. One of the Commissioners being a person who holds or has held judicial office shall be appointed Chairman.

(2) The Commissioners shall hold office during His Majesty's pleasure. If a vacancy occurs in the number of

Constitution, powers, and procedure of Scottish Ecclesiastical Commissioners. 150 *et seq.*; see *infra*, 619.

the Commissioners by reason of death, resignation, incapacity or otherwise, His Majesty may appoint some other person to fill the vacancy, and so from time to time as occasion requires.

(3) The Commissioners may act by any one or more of their body and notwithstanding any vacancy in their number; but if any person aggrieved by an order or decision of one Commissioner so requires, the order or decision shall be reconsidered on re-hearing by not less than three Commissioners.

(4) The procedure, place of meeting, and authentication of documents of the Commissioners shall be regulated in such manner as the Commissioners determine.

(5) The Commissioners may examine witnesses on oath, and for enforcing the attendance of witnesses, the examination of witnesses and the production of books and documents, shall have all such powers, rights, and privileges as are vested in any of His Majesty's Courts of Law.

(6) The Commissioners may appoint or employ a secretary and such other officers and persons and with such remuneration as they think necessary, and may remove any person so appointed or employed.

(7) The salaries and remuneration of any persons so appointed or employed, and all expenses of the Commissioners incurred in the execution of this Act, shall be paid out of moneys to be provided for that purpose by the General Assembly.

Orders of
Commis-
sioners.

21.—(1) The Commissioners may, after such inquiry in each individual case as they may think fit, make such orders as they may consider necessary or proper for any of the following purposes, that is to say:

151. (a) for giving effect to the schemes framed by the Commissioners under the provisions of this Act relating to burgh churches, including the modification of the Act 23 & 24 Victoria, chapter 50, entitled "An Act to abolish the annuity tax in Edinburgh and Montrose, and to make provision in regard to the stipends of the ministers in that city and burgh, and also to make provision for the patronage of the church of North Leith," and of any other local or personal Act, decree of the Court of Session or Court of Teinds or agreement relating to the burgh churches;

Ibid., 157.

- (b) for the transfer to the General Trustees of the 25, 42, 44,
parliamentary churches and manses under the 160.
provisions of the section of this Act relating
to parliamentary churches and manses;
 - (c) for the transfer to the General Trustees of the 25, 41, 162.
churches and manses of the parishes mentioned
in the Eighth Schedule to this Act;
 - (d) for the transfer to the General Trustees of en- 41.
dowments referred to in the section of this
Act relating to endowments in certain parishes
quoad omnia;
 - (e) for framing and giving effect to schemes relating 164, 367.
to churches and manses with respect to which
the sheriff may, as hereinafter provided, find
and declare that the case ought to be dealt with
by the Commissioners;
 - (f) for giving effect to the provisions of the section 349.
of this Act relating to the transfer of rights in
glebes;
 - (g) for framing and giving effect to a scheme or 42, 43.
schemes under the provisions of the section of
this Act relating to allocation by General
Trustees of certain moneys to be received from
the Treasury;
 - (h) for the protection and preservation of any church 172, 213.
or other ecclesiastical building which is for the
time being used for ecclesiastical purposes,
and which the Commissioners may, upon appli-
cation made to them by the Royal Commission
on Historic Monuments in Scotland or any per-
son interested, consider to require special pro-
visions in the public interest with respect to
maintenance and access;
 - (i) for the transfer to and administration by the
General Trustees of any capital sum fixed or
awarded and invested by way of commutation
of fish teinds under the provisions of the Fish 27 & 28 Vict.
Teinds (Scotland) Act, 1864; c. 33.
 - (j) for the transfer to a kirk session of communion 172, 195, 214,
plate or other ecclesiastical furnishings in use 486.
in a church or by a congregation in any case
in which a right of property in the plate or
other furnishings is claimed by any public
body;
 - (k) for any other matter or thing which the Com- 119, 214.
missioners consider to be necessary or proper in
connection with any of the purposes aforesaid.
- (2) Any such order shall have effect as if enacted in
this Act, and may be recorded in the Register of Sasines.

158. (3) In respect that the Act 23 & 24 Victoria, chapter 50, imposed an obligation on the town council of Edinburgh to grant a bond of annuity for the annual sum of four thousand two hundred pounds to the Edinburgh Ecclesiastical Commissioners for the purposes of the said Act, and in respect that the Act 33 & 34 Victoria, chapter 87, empowered the said town council to redeem the said bond of annuity by a payment to the said Commissioners of the sum of fifty-six thousand five hundred pounds and that the said bond of annuity was so redeemed by the payment of the said sum to the said Commissioners, nothing contained in this Act or in any order to be made by the Commissioners under the provisions of this section shall impose or be deemed to impose any further financial obligation or liability on the said town council in relation to the burgh churches situated within the burgh of Edinburgh, and any liability or obligation incumbent on the said town council in connection with the upkeep and maintenance or restoration or renewal of the burgh churches situated within the said burgh or payment of stipend to the ministers thereof shall be deemed to have been fulfilled and shall be at an end.

Burgh
churches.
151 *et seq.*

22. With respect to the churches mentioned in the Ninth Schedule to this Act (in this Act referred to as "burgh churches") the following provisions shall have effect:—

152. (1) As soon as conveniently may be after the passing of this Act the Commissioners shall inquire into all circumstances relating to existing rights of property in the fabrics and sites of the burgh churches, and any manse or other subjects connected therewith, and in any churchyards connected with the burgh churches, the stipends of the ministers thereof and any funds, endowments, pew rents or assessments from which the stipends of the ministers, the maintenance of the churches and other subjects, and any other expenditure in connection therewith is defrayed, and shall thereafter frame schemes for the future ownership, maintenance, and administration of the burgh churches and other subjects and the payment of stipend to the ministers:

309.

152 *et seq.*

- (2) Every such scheme shall make provision for—

(a) the transfer to the General Trustees of all rights of property vested in or belonging to the magistrates or the town council of any of the burghs within which the burgh

churches are situated in the fabrics and sites of the burgh churches and of any manses and other subjects connected therewith, and in any churchyards connected with the burgh churches, and for the transfer to the General Trustees of the duty of maintaining any property so transferred;

(b) the transfer to the General Trustees of all or any property held for church purposes by or on behalf of the magistrates or the town council of any of the burghs within which the burgh churches are situated;

(c) the periodical payment to the General Trustees of all sums which are at present paid or payable by the magistrates or town council of any of the said burghs in respect of the stipends of the ministers of the burgh churches and (so far as the Commissioners consider this to be equitable and reasonable) of all sums which are at present paid or payable by the magistrates or town council of any of the said burghs in respect of the ownership and maintenance of the fabrics and sites of the churches and manses, or other subjects connected therewith; 155-156, 458. 309.

(d) the redemption of such periodical payments by the payment to the General Trustees of a capital sum or by the creation of terminable annuities or of sinking funds;

(e) the transfer to the General Trustees of any property heritable or moveable held by any public body (whether statutory or otherwise) or person other than the magistrates or town council for the benefit of the minister of any of the burgh churches by way of stipend;

(f) the protection of the interests of the ministers or assistants and successors who at the passing of this Act are incumbents of the benefices of the burgh churches; 458.

(g) the protection (so far as the Commissioners consider this to be practicable) of the interests of town councils in the burgh churches as regards sittings allotted to the town councils for their use, the right to have the church bells rung on special occasions, and preservation of any other similar right or privilege hitherto enjoyed by the town councils; 214.

(h) the General Trustees before selling, feuing, or otherwise alienating a burgh church, 155 156

and the site thereof, giving to the town council of the burgh in which such burgh church is situated an opportunity of acquiring the same on such terms and conditions as may be agreed upon or as, failing agreement, may be determined by an arbiter to be appointed by the sheriff on the application of either party provided as follows:—

(i) The price to be paid to the General Trustees by the town council shall not exceed such a sum as would be necessary to reinstate the church on a new site within the municipal boundaries of the burgh in which such burgh church is situated, should it in the judgment of the General Trustees be necessary to provide at the time a new church within the municipal boundaries of such burgh;

155. (ii) In the event of it being unnecessary in the judgment of the General Trustees to provide at the time a new church such as aforesaid the price to be paid to the General Trustees by the town council shall not exceed such a sum as would be necessary to reimburse the General Trustees for all expenditure incurred by them subsequent to the passing of this Act, and within forty years prior to the date of the sale, for the repair, enlargement, or renewal of such burgh church, or part thereof, or as the case may be to liquidate any outstanding debt or obligation incurred or undertaken by the General Trustees relative to any such repair, enlargement, or renewal (so far as such expenditure, debt, or obligation has not been met out of any periodical payment made by the magistrates or town council of such burgh for the maintenance of such burgh church, or out of any capital sum, terminable annuity, or sinking fund paid in respect of the redemption thereof), and to meet the expenses of the necessary conveyance:

156. (3) The General Trustees shall not be entitled to sell, feu, or otherwise alienate any of the burgh churches or the site thereof to any person unless they shall have previously offered to convey such church or site to the town council of the burgh in which such church is situated, on the same terms and conditions as

they may be prepared to accept from such person, and the town council have failed to reply to the offer within a period of one month from the date thereof, or have within that period declined to accept the offer :

- (4) The provisions of this Act in regard to the transfer to the General Trustees of all rights of property in any churchyards connecting with the burgh churches, and the duty of maintaining any churchyards so transferred, shall not apply to the churchyards of Greyfriars and Canongate in the burgh of Edinburgh, or to the churchyard of St. David's or Rams-horn in the burgh of Glasgow, or to the churchyards of St. Nicholas and St. Clements in the burgh of Aberdeen, which churchyards shall continue to belong to and be maintained by the town councils of the said burghs, respectively : 259.
- (5) In the application of paragraphs (b), (c), and (d) of subsection (2) of this section to any scheme framed with respect to any of the burgh churches the Commissioners shall have regard to the conditions contained in the decree of disjunction and erection of the burgh church : 151, 157.
- (6) When all matters contained in the scheme relating to a burgh church have been duly carried out and implemented all liability or obligation incumbent on the magistrates and town council of the burgh in which a burgh church is situated, in connection with the upkeep and maintenance of such burgh church and payment of stipend to the minister thereof, shall be deemed to have been fulfilled and shall be at an end, subject only to the payment of any capital sum, terminable annuity, or sinking fund for the redemption of any periodical payment made by such magistrates or town council in connection with the maintenance of such church and the stipend of the minister thereof. 157.

23. With respect to the churches and manses mentioned in the Tenth Schedule to this Act (which together with any land whether described as churchyard, glebe, or otherwise connected with the said churches and manses are in this Act referred to as "parliamentary churches and manses") the following provisions shall have effect :—

Parliamentary churches and manses.
23, 43, 153-160, 310.

As soon as conveniently may be after the passing

of this Act the Commissioners shall inquire into all circumstances relating to existing rights of property in the fabrics and sites of the parliamentary churches and manses, and to the maintenance thereof whether under the provisions of the Act 5 George IV., Chapter 90, and any conveyance or other deed relating to any of the said churches and manses in favour of the Commissioners under the said Act or under any decision of the Court of Teinds or otherwise, and the Commissioners shall thereafter by order provide for the transfer to the General Trustees of the fabrics and sites of the said churches and manses, and of all powers and duties with respect to the maintenance and repair of the said fabrics and the allocation of sitting accommodation in the said churches.

A.D. 1925.

Churches and
manses of
certain
parishes
erected
under Act of
1844.
25, 42, 161-
162, 310.

24. With respect to the churches and manses of the parishes quoad omnia mentioned in the Eighth Schedule to this Act, the following provisions shall have effect:—

As soon as conveniently may be after the passing of this Act the Commissioners shall inquire into all circumstances relating to existing rights of property in the fabrics and sites of the churches and manses of the parishes aforesaid, and to the maintenance thereof whether under any existing titles relating to the said churches and manses or otherwise, and the Commissioners shall thereafter by order provide for the transfer to the General Trustees of the fabrics and sites of the said churches and manses, and of all powers and duties with respect to the maintenance and repair of the said fabrics, and the allocation of sitting accommodation in the said churches.

Endowments
in certain
parishes
quoad omnia.

25. Where in the case of a parish quoad omnia (not being one of the parishes quoad omnia mentioned in the Eighth Schedule to this Act) there exists any mortification or other endowment not derived from teinds which is for the benefit of the minister by way of stipend, the Commissioners shall, upon application made to them by the General Trustees, inquire into all circumstances relating to such endowment, and may thereafter by order provide for the transfer of the endowment to the General Trustees:

Provided that, except in the case of a benefice which is actually vacant at the passing of this Act, any order made by the Commissioners under this section shall not

take effect unless or until the benefice shall have become actually vacant after such passing.

PART III.

TRANSFER OF PARISH CHURCHES, MANSES, GLEBES, AND CHURCHYARDS. 105 *et seq.*, 138 *et seq.*, 212, 300, 510.

Arrangement of Sections.

Section	Section
26. Parish churches, manses, glebes, and churchyards.	30. Transfer of rights in glebes.
27. Proceedings relating to matters mentioned in sec. 3 of 31 & 32 Vict. c. 96.	31. Redemption of feu-duty affecting glebe.
28. Transfer of rights in parish churches and manses.	32. Transfer of parish churchyards.
29. Rights with respect to sitting accommodation in parish churches.	33. Preservation of monuments, &c., in churches and churchyards.

26. With a view to the transfer to and vesting in the Parish General Trustees of all rights of property in and duties of maintenance or extension with respect to the churches, manses, and glebes of PARISHES QUOAD OMNIA (other than the churches and manses of the parishes quoad omnia mentioned in the Eighth Schedule to this Act), the transfer to and vesting in the respective parish councils of all such rights in and duties with respect to the churchyards of such parishes, and the extinction of all such rights and duties as aforesaid heretofore belonging to and incumbent upon heritors or ministers, the following provisions of this part of this Act shall have effect, AND SHALL APPLY TO SUCH PARISHES ONLY. 35, 145, 112, 147-148, 165, 215.

27. No proceedings relating to any of the matters mentioned in section three of the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868, shall be instituted or entertained before or by any presbytery or any court of law or the Commissioners except as hereinafter in this Act provided. The foregoing provision shall be deemed to have had effect as on and from the first day of February, nineteen hundred and twenty-five, but without prejudice to any proceedings instituted before that date or to the enforcement of any order, finding, judgment, interlocutor, or decree made, given, or pronounced therein, or to any contract or agreement made by heritors before that date or to any resolution passed by heritors to levy an assessment to meet expenditure incurred in pur- Proceedings relating to matters mentioned in sec. 3 of 31 & 32 Vict. c. 96. 21, 35, 106, 107, 129, 140, 280, 301, 349, 359 *et seq.*, 507.

suance of such contract or agreement and any such assessment shall be recoverable as if this Act had not been passed.

Transfer of
rights in
parish
churches and
manse. 147.
140 *et seq.*,
293, 301 *et*
seq., 363, 520.
306.

28.—(1) Where the General Trustees are of opinion that any church or manse is not in a reasonable state of tenantable repair and that the duty of executing repairs is incumbent upon heritors, the General Trustees may agree with the heritors concerned for the repair of the same by or at the expense of the heritors or for the payment by the heritors to the General Trustees of a sum of money in lieu of repair, and failing agreement the General Trustees may within three years after the passing of this Act apply to the sheriff for an order directing the heritors to carry out such repairs (if any) not involving structural alterations as he may consider necessary, or if the General Trustees so require to pay to the General Trustees such sum of money in lieu of repair as the sheriff may determine. The sheriff shall deal with any such application in a summary manner and his decision shall be final.

293, 304.

110, 144, 308,
520.

(2) Any heritor concerned or the General Trustees may apply to the sheriff for a certificate that all obligations incumbent on the heritors with respect to the church or manse of a parish have been fulfilled, and the sheriff shall deal with the application in a summary manner and shall issue a certificate to that effect if the General Trustees state or admit that all such obligations have been fulfilled, or if failing such statement or admission, he is satisfied either that any agreement or order made as aforesaid has been implemented, or that notwithstanding the absence of any such agreement no application has been made for such an order within three years after the passing of this Act, or that any application for an order so made has been refused. The certificate may be in or as nearly as may be in the form set out in the Eleventh Schedule to this Act, and shall contain or refer to a description of the subjects whether church or manse to which it relates and may be recorded by the General Trustees or by any heritor concerned in the appropriate Register of Sasines.

144, 145.

(3) When a certificate issued by the sheriff under this section has been recorded as aforesaid—

106, 144, 365,
508.

(a) any liability or obligation incumbent on any heritor in connection with the subjects to which the certificate relates shall be at an end except the obligation or liability to assess or to be assessed for the repayment of any debt existing at the date of the certificate; and

106, 366.

(b) all rights of property in the said subjects shall by virtue of this Act and without the necessity

of any further conveyance vest in and belong to the General Trustees, to the same effect as if a complete feudal title holding of the Crown in free blench farm for payment of a penny Scots yearly if asked only had been duly constituted in favour of the General Trustees.

(4) Whereas in certain parishes, town councils in their capacity as town councils, or other public bodies (whether statutory or otherwise) or kirk sessions or persons are under the present law and practice or by Royal Warrant, charter, agreement or custom liable along with or in place of the heritors in obligations relating to the church or manse, it shall be lawful, in any such case, for the presbytery or the General Trustees or any other person concerned to apply to the sheriff to find and declare that the case ought to be dealt with by the Commissioners, and if the sheriff so finds and declares the provisions of this section shall have no further application to the case, and the Commissioners shall as soon thereafter as conveniently may be inquire into all circumstances relating to existing obligations in respect of the fabric and site of such church or manse and the manufacture of such fabric, and by order provide for the transfer to the General Trustees of the said fabric and site, and of all powers and duties with respect to the maintenance and repair of the said fabric.

108, 146 *et seq.*, 163-165, 366, 509.

(5) If in any application to the sheriff under this section a question arises as to whether or not the church or manse to which the application relates is the church or manse of a parish within the meaning of this section, that question shall be determined by the sheriff in a summary manner, and his determination shall be final.

(6) Whenever in any parish it shall be necessary in consequence of anything done, or agreed, or ordered to be done under or in pursuance of this section to impose any ecclesiastical assessment upon lands and heritages in the parish, and such assessment is imposed according to the real rent thereof, the following provisions shall have effect, in lieu of the provisions of section three of the Ecclesiastical Assessments (Scotland) Act, 1900 :—

135 *et seq.*, 492.
63 & 64 Vict. c. 20.

(a) No part of such assessment shall be imposed or levied upon lands and heritages occupied solely as the church and accessory buildings or burying-ground attached of any religious body, or as the dwelling-house with offices or garden or glebe land attached of the minister of such church;

(b) The rental on which each heritor shall be assessed shall be his total rental within the parish as

135 *et seq.*, 492.

72, 89, 108, 109, 110.

appearing in the valuation roll (whether such rental consists of one or more subjects), but subject to deduction of the sum of thirty pounds;

(c) The amount of the deficiency created in the total amount of the assessment, by allowing the said deduction of thirty pounds to every heritor, shall be defrayed by the General Trustees;

60, 62, 92.

(d) No heritor, who by reason of any exemption or deduction allowed by this subsection is relieved altogether from assessment in respect of the execution of any repair, or in respect of any payment by the heritors in lieu of repair, shall be entitled at any meeting of the heritors to take part in the discussion of, or to vote upon, any question concerning any plans for or the execution of the said repair, or the defraying of the expenses of the same, or any question concerning an agreement involving payment by the heritors in lieu of repair.

58, 59, 61, 62,
118, 119.

(7) Whenever in any parish it shall be necessary in view of anything to be done or agreed, or in consequence of anything done or agreed, or ordered to be done under or in pursuance of this section to call a meeting of heritors, a circular letter containing an intimation of the meeting shall be sent twenty-one clear days before the meeting to every known heritor whose total rental within the parish as appearing in the valuation roll (whether such rental consists of one or more subjects) exceeds the sum of thirty pounds, and intimation of the meeting shall also be given by advertisement in a newspaper circulating in the parish once during each of two successive weeks and within the said period of twenty-one days.

111, 359.

(8) Subject to the modifications in the two immediately preceding subsections of this section the existing law and practice relating to heritors' meetings and ecclesiastical assessments shall apply to meetings of heritors to be held and ecclesiastical assessments to be imposed under, or in consequence, or pursuance of this section.

Rights with respect to sitting accommodation in parish churches. 21, 111, 112, 145, 147 *et seq.*, 165, 204, 214-215, 486.

See *supra*, sec. 26, p. 561.

29. On the expiry of one year from the date on which any church is by or in pursuance of this Act transferred to the General Trustees the right of allocating sitting accommodation in the church, whether with or without payment therefor, and the right of disposal of any proceeds therefrom shall belong to the kirk session, or to such other body as the General Assembly may direct, and any existing right to such accommodation shall cease and terminate.

30. With respect to glebes, the following provisions shall have effect :—

Transfer of
rights in
glebes.
113 *et seq.*,
320, 348, 350
et seq., 368,
509, 510.

- (1) It shall be the duty of the clerk of every presbytery within one year after the passing of this Act to furnish to the Commissioners a list of the glebes appropriated to the ministers of the parishes in the presbytery, and of any cases where a minister has accepted or is entitled to any annual payment in place of glebe, and at the same time to intimate in which cases (if any) it is claimed by the presbytery (whether on the representation of the minister concerned or otherwise) that the heritors concerned have not fully implemented the obligations incumbent on them according to the present law and practice with respect to the provision and enlargement of a glebe :
- (2) As soon as conveniently may be after the receipt of the said lists, the Commissioners shall inquire into all circumstances relating to existing rights of property in the glebes, and in any payments in place of glebe, and shall thereafter make orders relating to the glebes and payments :
- (3) Every such order shall make provision for—
 - (a) the implement by the heritors of any obligations incumbent on them as aforesaid which have not already been implemented ; and
 - (b) the transfer to and vesting in the General Trustees of the ownership of the glebes ; and
 - (c) the preservation of the existing rights of all persons other than the heritors or the minister of the parish who, under or in pursuance of any general or local Act of Parliament or otherwise, have acquired any right in any glebe or any part thereof, whether as purchasers, feuars, or tenants, and the payment of any feu-duties, casualties, or rent to the General Trustees in place of the minister ; and
 - (d) the manner in which—
 - (i) any burden upon the glebe created under section eighteen of the Glebe Lands (Scotland) Act, 1866 and
 - (ii) any of the costs, charges and expenses referred to in that section which have not been made a burden on the glebe

c. 71.

may be dealt with, discharged and extinguished ; and

4 & 5 Geo. 5.
c. 48.

352, 520.

330.

Redemption
of feu-duty
affecting
glebe.

352.

(e) the transfer to the General Trustees of any feu-duties and Government or other securities or investments representing the price or consideration received for any glebe or part thereof or right therein under or in pursuance of the Glebe Lands (Scotland) Act, 1866, the Feudal Casualties (Scotland) Act, 1914, or any other general or local Act of Parliament, or any decree of the Court of Teinds, or any grant or contract validly made by a minister and held by any persons acting as trustees in trust for the payment of the income to the minister of the parish; and—

(f) the conversion into a money payment of any right of pasturage over any lands which is possessed by the minister as minister of the parish, and the redemption of that money payment, if the heritor or heritors concerned so desire, in such manner as may be agreed upon between the General Trustees and such heritor or heritors, or as, failing agreement, may be fixed by the Commissioners; and

(g) the protection of the interests of the ministers or assistants and successors who at the passing of this Act are incumbents of the benefice of any parish.

31. Where the glebe or any part thereof has been feued to the proprietors of conterminous lands in terms of section seventeen of the Glebe Lands (Scotland) Act, 1866, and the feu-duty payable therefor has been transferred to the General Trustees by an order made by the Commissioners, the said proprietors or their successors shall be entitled to redeem the feu-duty affecting the glebe or any part thereof—

(a) for such consideration or in such manner as may be agreed upon between the person liable and the General Trustees; or

(b) at any term of Whitsunday or Martinmas after three months' notice either—

(i) by payment to the Trustees of such a sum as would, if invested at the time of payment in Consolidated $2\frac{1}{2}$ per cent. annuities, produce an annual sum equal to the feu duty; or

(ii) by transfer to the General Trustees of such an amount of Consolidated $2\frac{1}{2}$ per cent. annuities as would produce an annual sum equal to the feu-duty.

32.—(1) The property of any churchyard heretofore held by the heritors of any parish shall as at and from the passing of this Act by virtue of this Act and without the necessity of any further conveyance be transferred from the heritors and vested in the parish council to the same effect as if the churchyard had been as at that date transferred by the heritors to the council in pursuance of subsection 6 of section thirty of the Local Government (Scotland) Act, 1894: Provided that due regard and respect shall be had by the parish council to the memory of the dead and the wishes of their relatives before any ground already allocated as a burial ground shall be treated as being vacant and unoccupied ground and re-allocated by the parish council as the burial place for another family or for the interment of another body: Provided also that in addition to the powers and duties by the said subsection transferred from the heritors to the parish council the power or duty of enlarging or extending the churchyard and assessing for the cost of such enlargement or extension shall also be so transferred and for the purpose of providing ground for such enlargement or extension or additional accommodation in a suitable and convenient situation, the parish council shall have and may exercise all the powers relating to the acquisition of land for burial grounds contained in the Burial Grounds (Scotland) Act, 1855, and the costs of providing, maintaining, and managing ground so acquired, so far as they require to be defrayed out of any rate, shall be a charge on the poor rate or the assessment under the said Act of 1855, as the parish council may determine: Provided further that where any churchyard transferred to a parish council by or in pursuance of this Act surrounds or adjoins any church or other ecclesiastical building vested in the heritors or in the General Trustees or in any other body holding the same in trust for the purpose of worship or for preservation as an ancient or historic monument—

Transfer of parish churchyards. 114, 171, 247 et seq., 369, 508.

57 & 58 Vict. c. 58.

18 & 19 Vict. c. 68.

- (a) the churchyard shall be held subject to a right of access to the minister and the congregation attending the church, and such other persons as may resort thereto for the purpose of public or private worship, or of inspecting or repairing the church, or for any other lawful purpose; and
- (b) no funeral shall be allowed to take place during the usual time of the ordinary services in the church; and
- (c) any road or path through the burial ground shall be kept in good and sufficient repair by the parish council; and

233, 253.

233.

(d) where the use of part of the churchyard is required for the enlargement or repair of the church it may be so used in any case where it might lawfully have been so used if this Act had not been passed and subject to the like conditions and restrictions, and where used for the purpose of the enlargement of the church the part so used shall thereupon vest in the heritors or the General Trustees or other body holding the church, as aforesaid.

225, 249, 257. (2) The provisions relating to the sale of the right of burial contained in section eighteen of the Burial Grounds (Scotland) Act, 1855, shall apply to any churchyard transferred to a parish council by or in pursuance of this Act, and to any enlargement or extension thereof.

249. (3) Where the powers and duties conferred and imposed by the Burial Grounds (Scotland) Act, 1855, are exercised and carried out by a local authority other than the parish council, the foregoing provisions of this section shall, with the necessary modifications, have effect as if that authority were named therein instead of the parish council, and any expenses of the local authority due to the operation of this section shall be defrayed in the same manner as expenses under the said Act of 1855. Where in any parish the powers and duties conferred and imposed by the said Act of 1855 are carried out by more than one local authority, this subsection shall be held to refer to the local authority carrying out the said powers and duties within the district where the churchyard is situated.

225, 247, 250. (4) Where the property of a churchyard is held by the kirk session of the parish the foregoing provisions of this section shall, with the necessary modifications, have effect as if the kirk session were named therein and in subsection (6) of section thirty of the Local Government (Scotland) Act, 1894, instead of the heritors.

253, 487. (5)—(a) Where a churchyard of a parish has been closed—

60 & 61 Vict.
c. 38. (i) either before or after the passing of this Act under the Burial Grounds (Scotland) Act, 1855, or as a result of proceedings under the Public Health (Scotland) Act, 1897; or

(ii) before the passing of this Act by resolution of the heritors on the ground that no accommodation for further interments remains available therein; or

(iii) by desuetude during a period of twenty years or upwards prior to the passing of this Act;

the kirk session of the parish may, within ten years after

the passing of this Act, in the case of a churchyard which has been closed before the passing of this Act, or within ten years after the date of the closing of a churchyard in the case of a churchyard closed after the passing of this Act, intimate in writing to the parish council or other local authority to whom the churchyard has been transferred that the kirk session desire to take over the custody, maintenance, and control of such churchyard, and the parish council or other local authority, as the case may be, shall, on receiving such intimation, transfer the custody, maintenance, and control of such churchyard to the kirk session, subject always to such conditions (if any) as the parish council or other local authority may appoint with respect to the public right of access to the churchyard free of charge.

(b) Where a churchyard of a parish which has been transferred to a parish council or other local authority has been closed, or has ceased to be used for interment, the parish council or other local authority, as the case may be, may at any time, upon the application in writing of the kirk session of the parish, transfer the custody, maintenance, and control of such churchyard to the kirk session. 254, 487.

(c) Where the custody, maintenance, and control of a churchyard have, in pursuance of this subsection, been transferred to the kirk session, the kirk session shall thenceforward be responsible for such custody, maintenance, and control, and for any expense in connection therewith. 254, 486.

33. For the preservation and maintenance of any family burying ground, or enclosure, tombstone, monument, or other memorial to the dead, in any parish churchyard or parish church, any person who, in the case of a parish churchyard, satisfies the parish council or other body to whom the parish churchyard or the control thereof is transferred, and in the case of a parish church satisfies the General Trustees that he has an interest in such burying ground, enclosure, tombstone, monument, or other memorial, on the ground of relationship to the deceased person or persons therein buried or thereby commemorated, shall be entitled, with the approval of the parish council or other body to whom the parish churchyard or the control thereof is transferred, or the General Trustees, as the case may be, to provide for the preservation and maintenance of the same. Preservation of monuments, &c., in churches and churchyards. 148-149, 215, 250, 488.

PART IV.

212.

GENERAL.

Arrangement of Sections.

Section	Section
34. Provisions relating to <i>quoad sacra</i> parishes.	40. Redemption of manse maill, &c.
35. Provisions relating to the allocation and redemption of bonds of annual rent held for behoof of <i>quoad sacra</i> churches.	41. Provisions relating to Court of Teinds.
36. Requirements of parish to be first charge on endowments.	42. Application to Crown lands.
37. Powers of General Trustees.	43. Provisions with respect to certain registration districts.
38. Additional powers of General Trustees.	44. Provisions for preservation of heritors' records.
39. Allocation by General Trustees of certain moneys to be received from Treasury.	45. Saving for obligations of relief.
	46. Saving for superiors.
	47. Interpretation.
	48. Repeal.
	49. Short title.

Provisions relating to *quoad sacra* parishes.
7 & 8 Vict.
c. 44; 31 & 32
Vict. c. 30;
39 & 40 Vict.
c. 11.
22, 38 *et seq.*,
165 *et seq.*,
310, 520.

21, 38 *et seq.*,
163-170.

34. With respect to parishes *quoad sacra* erected under the New Parishes (Scotland) Act, 1844, the United Parishes (Scotland) Act, 1868, and the United Parishes (Scotland) Act, 1876 (other than parishes *quoad sacra* erected under section fourteen of the said Act of 1844), the following provisions shall have effect:—

(1) In the case of a parish erected before the passing of this Act—

(a) The statutory properties and endowments of the parish shall be transferred to the General Trustees as in this section provided;

(b) As soon as conveniently may be after the passing of this Act there shall be prepared by the General Trustees and certified by the Clerk of Teinds with respect to each parish, an inventory referring to this section of this Act and setting out the statutory properties and endowments of the parish, and each such inventory shall specify—

(i) the name of the parish;

(ii) each property or security forming part of the said statutory properties and endowments; and

(iii) the name or names of the person or persons in whom the same is vested;

(c) Without prejudice to the provisions of the immediately following paragraph of this subsection any person in whom any property or security specified in any such inventory is vested shall if so required by the General Trustees, and at their expense, transfer such property or security to the General Trustees, and do and concur in doing all acts and things necessary for that purpose;

(d) Upon any such inventory in so far as the same relates to heritable properties or securities being recorded in the appropriate register of sasines the heritable properties and securities specified in such inventory shall by virtue of this Act and without the necessity of any further conveyance be deemed and taken to be validly transferred to and vested in the General Trustees as if a disposition or assignation by the person or persons in whom the said heritable properties or securities were vested had been granted in favour of the General Trustees and had been recorded in the appropriate register of sasines;

(e) (i) The Clerk of Teinds shall make available to the General Trustees, so far as may be necessary for the purposes of this section, all or any title deeds, certificates, or other documents which are in his custody as keeper of the records of the Court of Teinds relating to any properties or securities specified in any such inventory;

(ii) Upon the completion of the transfer of any such properties and securities to the General Trustees the Clerk of Teinds shall hand over to the General Trustees any title deeds, certificates, or other documents relating to the same which are in his custody as aforesaid upon a receipt therefor being given by the General Trustees;

(f) The General Assembly, or any body to 31, 40, 41. which the General Assembly may delegate the necessary power, may at any time after the completion of the transfer to the General Trustees of the properties and securities specified in any such inventory alter the existing deed of constitution of the parish to which the inventory relates, or annul the said deed and grant a new deed of constitution in place thereof:

110, 169, 173.

(g) The statutory properties and endowments of the parish transferred to the General Trustees under or by virtue or in pursuance of this subsection shall, notwithstanding anything elsewhere in this Act contained, be held by the General Trustees for the same ends, uses, and purposes as those for which they were held by the trustees or other persons in whom they were vested prior to their being so transferred;

32, 37, 170.

(2) In the case of a parish erected after the passing of this Act—

(a) the titles, deeds, certificates, and other documents of or relating to the statutory properties and endowments of the parish shall be taken in the name of the General Trustees;

33, 40, 41.

(b) the original deed of constitution shall be in such terms as the General Assembly, or any body to which the General Assembly may delegate the necessary power, may direct, and the General Assembly or any such body may subsequently alter the said deed or annul the same and grant a new deed of constitution in place thereof:

41, 170.

(3) Nothing in this section shall apply to any permanent endowment secured from teinds under section thirteen of the New Parishes (Scotland) Act, 1844:

170, 195.

(4) In this section—

the expression “ the statutory properties and endowments of the parish ” means—

(i) the church erected as a parish church for the parish under the aforesaid Acts of 1844, 1868, and 1876; and

310, 353.

(ii) where a manse or glebe has been permanently provided under the said Acts as part of the endowment of the minister of the parish, such manse or glebe; and

(iii) any feu-duties, ground annuals, bonds of annual rent, or other heritable securities permanently provided and secured at the time of erection or subsequently substituted with the sanction of the Court of Teinds for the minister of the parish or for the maintenance of the church or manse or payment of the feu-duty thereon; and

(iv) any Government securities or other

securities or investments (not being heritable securities) permanently provided and secured or substituted as aforesaid;

the expression "church" includes the fabric¹³⁵ and site of the church and hall (if any) and any ground used as a burial ground in connection therewith;

the expression "manse" includes the dwelling-house and offices and appurtenances thereof.

35.—(1) Where the debtor under any bond and disposition in security, bond of annual rent, or other heritable security, whereby the payment of any annual sum is secured over land in favour of the minister of any parish quoad sacra erected under the New Parishes (Scotland) Act, 1844, the United Parishes (Scotland) Act, 1868, and the United Parishes (Scotland) Act, 1876, or in favour of the trustees acting under the deed of constitution of any such parish or of the General Trustees as coming in place of such minister or trustees (such minister or trustees or the General Trustees, as the case may be, being hereinafter in this section referred to as "the creditor"), sells or has sold any portion of such land the debtor shall be entitled to allocate upon the portion of such land so sold such a proportion of such annual sum as may be agreed upon between the debtor and the creditor, or, failing agreement, as may be fixed by the sheriff of the county in which such land is situated upon the application of the debtor.

Provisions relating to the allocation and redemption of bonds of annual rent held for behoof of quoad sacra churches.
171.

(2) If, as a result of any such allocation as is provided in the preceding subsection, the proportion of such annual sum so allocated, or the proportion of such annual sum remaining unallocated, does not exceed one pound in amount, the debtor shall forthwith redeem the same by payment to the General Trustees of a sum equal to the proportion of such annual sum so allocated, or to the proportion of such annual sum remaining unallocated, as the case may be, multiplied by twenty, and if the proportion of such annual sum so allocated, or the proportion of such annual sum remaining unallocated, exceeds one pound but is less than fifteen pounds in amount, such proportion shall be increased from the date when such allocation takes effect by five per cent.

(3) Where the debtor and the creditor have agreed upon, or the sheriff has fixed, the proportion of such annual sum to be allocated the debtor shall be entitled to obtain from the creditor a memorandum of allocation in or as nearly as may be in the form of the Thirteenth

Schedule to this Act, and upon such memorandum of allocation being recorded in the appropriate register of sasines the allocation contained therein shall be binding on all having interest.

(4) Such annual sum or an allocated proportion thereof exceeding one pound may at any time be redeemed by and in the option of the debtor either

(a) for such consideration or in such manner as may be agreed upon between the debtor and the creditor; or

(b) at any term of Whitsunday or Martinmas after three months' notice either

(i) by payment to the creditor of such a sum as would, if invested at the time of payment in Consolidated $2\frac{1}{2}$ per cent. annuities, produce a yearly amount equal to the annual sum to be redeemed.

(ii) by transfer to the creditor of such an amount of Consolidated $2\frac{1}{2}$ per cent. annuities as would produce a yearly amount equal to the annual sum to be redeemed.

(5) Upon such annual sum or the allocated proportion thereof being redeemed by the debtor, as in this section provided, the debtor shall be entitled to obtain from the creditor a deed or other document disburdening the land over which the same is secured, which shall be recorded on behalf of the debtor in the appropriate register of sasines.

(6) The whole expenses of any allocation of such annual sum and of the redemption of such annual sum or a proportion thereof shall be defrayed by the debtor.

(7) In this section the word "debtor" includes the original debtor, his successor in such land, any uninfert or infert purchaser of such land or portion thereof, or any disponent to whom such land or portion thereof may be disposed.

Requirements
of parish to
be first
charge on
endowments.
36, 172.

36. All moneys received by the General Trustees with respect to any parish under or in pursuance of the provisions of this Act relating to stipend and any church, manse, glebe or other property heritable or moveable situated in, or forming part of, the endowments of any parish transferred to, or received by, the General Trustees by or in pursuance of this Act, and the proceeds of any such moneys, property, or endowments shall be appropriated in the first place to meeting the proper requirements of that parish or its neighbourhood (as such requirements may be determined by the General Assembly or by any body to which the General Assembly may dele-

gate the necessary power), and any remainder after these requirements have been fully met shall form part of a general fund at the disposal of the General Assembly: Provided that except where a benefice is actually vacant at the passing of this Act or has become actually vacant thereafter—

- (a) all payments received by the General Trustees 173. from heritors in respect of a stipend or standard charge until the same is redeemed, and the income from the redemption money in respect of the stipend or standard charge, shall be appropriated to the payment of that stipend after deduction of a sum not exceeding two per centum of the said payments and income to meet the expense of administration; and
- (b) the determination of the General Assembly shall not be exercised so as to decrease the amount of stipend, or the income from, or in respect of, any property transferred to the General Trustees as aforesaid to be received by the incumbent of a benefice nor so as to diminish the benefit to be derived by the incumbent from the use or occupation of any such property.

37. In addition to any powers which they already enjoy, the General Trustees shall have power to hold, maintain, administer, and dispose of any property of whatsoever description transferred to, or received by, or vested in them under, or in pursuance of this Act, subject always to the provisions of this Act and to the directions of the General Assembly: Provided that the General Trustees before selling or feuing a glebe or any part thereof shall give to the heritor or heritors whose lands adjoin such glebe or part an opportunity to purchase or take the same in feu at such price or feu-duty and on such terms as may be agreed upon between the General Trustees and the heritor or heritors, or as may, failing agreement, be determined by an arbiter appointed by the sheriff on the application of either party. Without prejudice to the foregoing generality, the General Trustees shall have power, subject as aforesaid, to compromise or settle any claim against or by any heritor or other person arising out of anything contained in this Act or done thereunder.

Powers of
General
Trustees.
99, 144, 329,
338, 515 *et*
seq.

111, 306, 515.

38.—(1) The General Assembly shall have power to appoint from among the General Trustees a chairman and a vice-chairman of the General Trustees who shall respectively hold office for such period with such powers and

Additional
powers of
General
Trustees.
99, 516 *et seq.*

duties, and subject to such conditions as the General Assembly may determine, and such chairman and vice-chairman or either of them may receive such remuneration as the General Assembly may from time to time fix. Such chairman, whom failing such vice-chairman, shall when present act as chairman at all meetings of the General Trustees, and when so present shall come in place of any chairman failing to be appointed under section thirteen of the Church of Scotland (General Trustees) Order, 1921, and shall have the like voting powers. Without prejudice to the provisions of the said section with respect to the manner in which meetings of the General Trustees may be called, the chairman or the vice-chairman appointed by the General Assembly may direct that meetings of the General Trustees shall be called.

(2) The General Trustees shall have power to appoint or employ (either from among their own number or otherwise) a solicitor or legal adviser to the General Trustees and such additional officers, attorneys, and persons as they may consider necessary for the proper conduct of the business of the General Trustees, and to pay to such solicitor or legal adviser or other officers, attorneys, or persons employed by them suitable remuneration for their services.

(3) Any intimation to the General Trustees shall be competently made if addressed to the clerk or the chairman or vice-chairman of the General Trustees on their behalf at the known address of the General Trustees in Edinburgh, and any intimation by the General Trustees shall be competently made by the clerk or the chairman or vice-chairman on their behalf.

518. (4) The General Assembly shall have power to determine from time to time the number of General Trustees who shall form a quorum at meetings of the General Trustees, provided always that the number so determined shall in no case be less than three as prescribed in section thirteen of the Church of Scotland (General Trustees) Order, 1921.

(5) All expenses incurred by the General Trustees in the discharge of their duties under this Act, so far as such expenses are not otherwise provided for under this Act, shall be defrayed in such manner as the General Assembly may determine, and the provisions of section nineteen of the said Order of 1921 shall not apply to such expenses.

(6) The General Assembly may from time to time make byelaws and regulations to be observed by the General Trustees in the discharge of their duties under this Act.

39.—(1) As soon as conveniently may be after the passing of this Act the Commissioners shall frame a scheme or schemes for the allocation by the General Trustees of the annual sums of twelve thousand pounds and five thousand and forty pounds mentioned in the Seventh Schedule to this Act, and of the income from any capital sum or sums received by them in redemption of the said annual sums, or either of them, and for the payment by the General Trustees of the various amounts so allocated.

Allocation
by General
Trustees of
certain
moneys to
be received
from
Treasury.
519.

(2) In framing any such scheme the Commissioners shall provide for the protection of the interests of the ministers who at the passing of this Act are entitled to augmentations of stipend under the Teinds Act, 1810, and the Teinds Act, 1824, or to stipend under the Act 5 Geo. 4, c. 90, and the right in name of Ann of the widow or other representatives of any such minister, and for that purpose the Commissioners shall have regard to the provisions of the aforesaid Acts, notwithstanding any repeal of those provisions under this Act.

50 Geo. 3,
c. 84.
5 Geo. 4,
c. 72.

(3) Pending the making by the Commissioners of an Order giving effect to a scheme under this section, the General Trustees may, out of the annual sums or the income from any capital sum or sums aforesaid, pay to any minister or assistant and successor, or widow or other representative of a deceased minister, or to the Collector of the Church of Scotland Ministers' and Scottish Universities' Professors' Widows' Fund, as the case may be, such half-yearly sum or sums, as in the judgment of the General Trustees, would have been payable under the aforesaid Acts to such minister or assistant and successor, or widow or other representative, or Collector if this Act had not been passed.

40.—(1) Where in any parish manse mail is at the passing of this Act payable in lieu of a manse the heritors legally liable in payment thereof shall redeem the manse mail by payment to the General Trustees of a sum equal to the annual amount thereof multiplied by twenty, such redemption payment to be made within five years after the passing of this Act.

Redemption
of manse
mail, &c.
112-113, 307-
308.

(2) Where a manse has been sold and the price invested and the income from the investments representing the price paid to the minister, those investments shall within five years after the passing of this Act be transferred to the General Trustees, and on the completion of the transfer any liability of the heritors in respect thereof shall cease.

113.

Provisions
relating to
Court of
Teinds.
31 & 32 Vict.
c. 100.

41. Notwithstanding anything in the Court of Session (Scotland) Act, 1868, the Court of Teinds may meet at such hours as may be convenient on such days as the Court of Session may by Act of Sederunt prescribe, and section one hundred and six of the said Act of 1868 (which relates to Acts of Sederunt) shall, for the purposes of Acts of Sederunt relating to the Court of Teinds, have effect as if references to that Act in the said section included references to this Act.

Application
to Crown
lands.

42. This Act shall be binding on the Crown and the provisions of this Act shall apply to lands vested in His Majesty in right of the Crown, and to lands vested in any Government Department for public purposes, and to the teinds of any lands so vested in His Majesty or in any Government Department.

Provisions
with respect
to certain
registration
districts.

43. Where under the provisions of the Births, Deaths and Marriages (Scotland) Acts, 1854 to 1910, the powers and duties by those Acts conferred and imposed on parish councils belong to and are discharged by the heritors, it shall be lawful for the sheriff, upon the application of the parish council of any parish wholly or partly comprised in the registration district, or upon the application of the Registrar-General of Births, Deaths, and Marriages in Scotland, to regulate and determine all questions as to the right to elect a registrar for the registration district, and all questions as to the assessments to be levied for registration purposes within the district; and it shall also be lawful for the sheriff to regulate and determine all questions as to such right of election and such assessments in any case where two or more parishes or portions of parishes may hereafter be united into one registration district; and any decision of the sheriff under this section shall be final and not subject to review.

Provisions
for preser-
vation of
heritors'
records.
114-115, 120.
See *infra*, 624.

44. Whereas in consequence of the transfers of rights of property and the transfer or termination of obligations in connection therewith effected or to be effected by or under or in pursuance of this Act, the powers and duties of heritors (including the power and duty to impose and levy heritors' assessments) will in due course be extinguished, it shall be the duty of the clerk to the heritors of any parish where such extinction has been effected to make intimation thereof in writing to the Secretary for Scotland, who may by order under his hand give such direction as he may think necessary or proper with respect to the preservation and permanent custody of the books

of the heritors or any records or documents in their possession as heritors or in the possession of their clerk.

45. Nothing in this Act shall prejudice or affect any obligation to relieve the heritor of any lands from liability in respect of any stipend or augmentation thereof exigible from the teinds of such lands, and any such obligation shall extend to relief from liability in respect of any standard charge over those lands or in respect of any payments under the section of this Act relating to provisions where stipend does not exceed one pound. Saving for obligations of relief. 114.

46. Nothing in this Act shall affect or be deemed to affect the rights of superiors of the sites of the churches mentioned in the Ninth Schedule to this Act, where the superiorities are not held by or on behalf of town councils, to payment of their feu duties from the parties in whom the dominium utile of the said sites is vested by this Act or otherwise, and to all other rights and privileges vested in such superiors prior to the passing of this Act. Saving for superiors. 157.

47.—(1) In this Act, unless the context otherwise requires— Interpretation.

“ The Church ” means the Church of Scotland;

“ The General Assembly ” means the General Assembly of the Church;

“ The General Trustees ” means the Church of Scotland General Trustees incorporated by the Church of Scotland (General Trustees) Order, 1921;

“ The Commissioners ” means the Scottish Ecclesiastical Commissioners to be appointed under this Act;

“ Minister ” means a minister of the Church;

“ Stipend ” means the stipend of a minister, including any allowance for communion elements payable by heritors out of teinds;

“ Glebe ” means the lands appropriated to a minister as his glebe, and shall be deemed to include grass glebe or minister's grass, servitudes, right of pasturage, or other heritable rights belonging to the minister and forming part of the benefice, or any money payments in use to be made to the minister in respect of the said rights or any of them, and any land settled in perpetuity on the minister for the time being; 348.

“ Court of Teinds ” has the same meaning as in the United Parishes (Scotland) Act, 1876;

“ Manse ” and “ Lord Ordinary ” have the same meanings as in the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868.

(2) For the purposes of this Act the surrendered teinds of any lands payable as stipend shall be deemed to be stipend exigible from the teinds of those lands.

(3) The reference to “ teinds ” in section fifty-nine of the Improvement of Land Act, 1864, shall be construed so as to include standard charges.

27 & 28 Vict.
c. 114.

Repeal.

37, 111, 330,
363, 471.

48. The enactments specified in the Twelfth Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule, **and so much of any Act as is inconsistent with this Act is also hereby repealed.**

Short title.

49. This Act may be cited as the Church of Scotland (Property and Endowments) Act, 1925.

SCHEDULES.

FIRST SCHEDULE.

TABLE A.—FIARS PRICES FOR THE COUNTIES OF SCOTLAND.

Average 1873 to 1922 inclusive.—Showing the value of One Boll of Meal and One Boll of Barley in each county according to these prices, and the average value of the Double Boll of Meal and Barley, and the average value of the Chalder in each county.

County.	Meal.			Barley.			Value of the Double Boll of Meal and Barley.			Value of 1 Chalder calculated to nearest Penny.		
	Average Value of 1 Boll for crops and years 1873-1922.			Average Value of 1 Boll for crops and years 1873-1922.								
	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.
1. Aberdeen, - -	0	16	11 $\frac{9}{12}$	1	3	5 $\frac{9}{12}$	2	0	5 $\frac{9}{12}$	16	3	8
2. Argyll, - - -	1	0	5 $\frac{8}{12}$	1	3	6	2	3	11 $\frac{8}{12}$	17	11	9
3. Ayr, - - - -	0	18	6 $\frac{1}{12}$	1	5	0 $\frac{8}{12}$	2	3	7 $\frac{9}{12}$	17	8	11
4. Banff, - - -	0	16	11 $\frac{8}{12}$	1	4	7	2	1	6 $\frac{9}{12}$	16	12	2
5. Berwick, - - -	1	0	1 $\frac{4}{12}$	1	4	11 $\frac{4}{12}$	2	5	0 $\frac{5}{12}$	18	0	3
6. Bute, - - - -	0	19	6 $\frac{1}{12}$	1	3	11 $\frac{0}{12}$	2	3	6 $\frac{0}{12}$	17	8	6
7. Caithness, - -	0	17	2 $\frac{9}{12}$	1	0	5 $\frac{9}{12}$	1	17	7 $\frac{1}{12}$	15	1	3
8. Clackmannan, -	0	18	9 $\frac{7}{12}$	1	4	0 $\frac{2}{12}$	2	2	9 $\frac{4}{12}$	17	2	6
9. Dumbarton, - -	1	0	6 $\frac{4}{12}$	1	3	1 $\frac{4}{12}$	2	3	7 $\frac{4}{12}$	17	8	11
10. Dumfries, - -	0	18	3 $\frac{7}{12}$	1	4	8 $\frac{1}{12}$	2	3	0 $\frac{6}{12}$	17	4	4
11. Edinburgh or Mid Lothian, -	0	19	0 $\frac{3}{12}$	1	5	4	2	4	4 $\frac{8}{12}$	17	14	10
12. Elgin or Moray, -	0	17	7 $\frac{8}{12}$	1	5	1 $\frac{4}{12}$	2	2	8 $\frac{0}{12}$	17	1	11
13. Fife, - - - -	0	19	3 $\frac{1}{12}$	1	4	0 $\frac{1}{12}$	2	3	3 $\frac{9}{12}$	17	6	6
14. Forfar, - - -	0	18	10	1	2	4 $\frac{4}{12}$	2	1	2 $\frac{4}{12}$	16	9	7
15. Haddington or East Lothian, -	1	0	3 $\frac{3}{12}$	1	8	3 $\frac{4}{12}$	2	8	6 $\frac{7}{12}$	19	8	5
16. Inverness, - -	0	18	5 $\frac{2}{12}$	1	5	0 $\frac{6}{12}$	2	3	5 $\frac{8}{12}$	17	7	9
17. Kincardine, - -	0	17	10 $\frac{2}{12}$	1	2	1 $\frac{3}{12}$	1	19	11 $\frac{8}{12}$	15	19	8
18. Kinross, - - -	0	19	5 $\frac{8}{12}$	1	2	6 $\frac{5}{12}$	2	2	0 $\frac{1}{12}$	16	16	1
19. Kirkcudbright, -	0	17	10 $\frac{4}{12}$	1	4	6 $\frac{5}{12}$	2	2	4 $\frac{9}{12}$	16	19	2
20. Lanark, - - -	1	0	4 $\frac{9}{12}$	1	4	11	2	5	3 $\frac{9}{12}$	18	2	6
21. Linlithgow or West Lothian, -	0	19	7 $\frac{0}{12}$	1	4	7 $\frac{6}{12}$	2	4	3 $\frac{3}{12}$	17	14	2
22. Nairn, - - - -	0	18	9 $\frac{5}{12}$	1	5	2 $\frac{3}{12}$	2	3	11 $\frac{8}{12}$	17	11	9
23. Orkney, - - -	0	15	2 $\frac{3}{12}$	0	16	7 $\frac{0}{12}$	1	11	10	12	14	8
24. Peebles, - - -	1	1	3 $\frac{8}{12}$	1	5	4 $\frac{9}{12}$	2	6	8 $\frac{5}{12}$	18	13	7
25. Perth, - - - -	0	19	5 $\frac{4}{12}$	1	3	6 $\frac{10}{12}$	2	3	0	17	4	0
26. Renfrew, - - -	0	19	9 $\frac{7}{12}$	1	4	11 $\frac{8}{12}$	2	4	9 $\frac{3}{12}$	17	18	2
27. Ross and Cromarty, -	0	18	3 $\frac{3}{12}$	1	4	5 $\frac{5}{12}$	2	2	8 $\frac{8}{12}$	17	1	9
28. Roxburgh, - -	0	19	8 $\frac{10}{12}$	1	4	7	2	4	3 $\frac{10}{12}$	17	14	7
29. Selkirk, - - -	0	19	0 $\frac{6}{12}$	1	4	2 $\frac{8}{12}$	2	3	3 $\frac{2}{12}$	17	6	1
30. Stirling, - - -	1	0	0 $\frac{10}{12}$	1	4	1 $\frac{0}{12}$	2	4	2 $\frac{1}{12}$	17	13	5
31. Sutherland, - -	0	19	2 $\frac{3}{12}$	1	4	1 $\frac{5}{12}$	2	3	3 $\frac{8}{12}$	17	6	5
32. Wigtown, - - -	0	17	3 $\frac{5}{12}$	1	3	6 $\frac{7}{12}$	2	0	10	16	6	8

TABLE B.—FIARS PRICES FOR THE COUNTIES OF SCOTLAND.

Average 1873-1922 inclusive.—Showing the Value of one quarter of Wheat, Oats, Bear and Barley in each County according to an average of the fiars prices struck for the 50 years 1873-1922.

County.	Wheat per Quarter.			Oats per Quarter.			Bear per Quarter.			Barley per Quarter.		
	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.
1. Aberdeen, - -	1	18	1 ⁵ / ₂	1	2	1 ⁰ / ₂	1	3	11	1	12	2 ¹ / ₂
2. Argyll, - - -	2	1	2 ⁴ / ₂	1	4	1 ⁰ / ₂	1	11	1 ⁶ / ₂	1	12	3 ³ / ₂
3. Ayr, - - -	1	16	11 ⁴ / ₂	1	2	0 ⁵ / ₂	1	5	7	1	14	4 ¹ / ₂
4. Banff, - - -	1	18	8 ⁸ / ₂	1	2	10 ⁰ / ₂	1	9	1	1	13	9 ³ / ₂
5. Berwick, - - -	1	19	7 ¹⁰ / ₂	1	5	8 ¹ / ₂	—	—	—	1	14	3 ¹ / ₂
6. Bute, - - -	2	3	1 ³ / ₂	1	4	0 ³ / ₂	1	8	9 ¹ / ₂	1	12	11 ¹ / ₂
7. Caithness, - -	—	—	—	1	0	3 ¹ / ₂	1	6	5 ¹ / ₂	1	8	0 ⁵ / ₂
8. Clackmannan, -	1	15	10 ⁵ / ₂	1	4	1 ¹ / ₂	—	—	—	1	12	11 ⁰ / ₂
9. Dumfries, - -	1	16	1 ¹ / ₂	1	3	9 ¹ / ₂	1	8	11 ⁸ / ₂	1	11	8 ¹ / ₂
10. Dumfries, - -	1	19	3 ⁵ / ₂	1	3	6 ⁸ / ₂	—	—	—	1	13	11 ⁵ / ₂
11. Edinburgh or Mid Lothian, - - -	1	17	10 ⁵ / ₂	1	5	3 ⁷ / ₂	—	—	—	1	14	9 ⁵ / ₂
12. Elgin or Moray, -	1	17	7 ⁰ / ₂	1	2	9 ¹ / ₂	—	—	—	1	14	5 ¹⁰ / ₂
13. Fife, - - -	1	15	10 ⁸ / ₂	1	2	11 ⁶ / ₂	1	3	11 ³ / ₂	1	12	11 ¹ / ₂
14. Forfar, - - -	1	15	8 ⁶ / ₂	1	2	10	1	4	6 ⁹ / ₂	1	10	8 ⁷ / ₂
15. Haddington or East Lothian, -	2	1	9 ⁸ / ₂	1	8	7 ⁶ / ₂	—	—	—	1	18	10
16. Inverness, - -	2	1	2	1	2	11 ¹ / ₂	1	12	2 ⁸ / ₂	1	14	4 ⁹ / ₂
17. Kincardine, - -	1	15	11 ⁷ / ₂	1	2	3 ¹⁰ / ₂	1	3	7 ¹ / ₂	1	10	4 ³ / ₂
18. Kinross, - - -	2	1	0 ³ / ₂	1	2	11 ¹ / ₂	—	—	—	1	10	11 ¹ / ₂
19. Kirkcudbright, -	1	17	4 ⁰ / ₂	1	2	7 ¹ / ₂	—	—	—	1	13	8 ¹ / ₂
20. Lanark, - - -	1	17	1 ³ / ₂	1	3	8 ³ / ₂	—	—	—	1	14	2 ⁵ / ₂
21. Linlithgow or West Lothian, -	1	17	4 ¹ / ₂	1	4	2 ⁶ / ₂	—	—	—	1	13	9 ¹ / ₂
22. Nairn, - - -	1	19	7 ¹ / ₂	1	2	10 ⁵ / ₂	—	—	—	1	14	7 ⁵ / ₂
23. Orkney, - - -	—	—	—	—	—	—	1	2	10 ³ / ₂	1	2	10 ³ / ₂
24. Peebles, - - -	2	0	0	1	5	2 ³ / ₂	—	—	—	1	14	10 ⁷ / ₂
25. Perth, - - -	1	17	3 ⁸ / ₂	1	3	8	—	—	—	1	12	4 ⁵ / ₂
26. Renfrew, - - -	1	17	0 ⁷ / ₂	1	3	10 ¹ / ₂	—	—	—	1	14	3 ⁷ / ₂
27. Ross and Cromarty, - -	1	19	1 ⁶ / ₂	1	3	3 ⁷ / ₂	—	—	—	1	13	6 ¹ / ₂
28. Roxburgh, - -	1	18	5 ⁸ / ₂	1	4	10 ³ / ₂	—	—	—	1	13	9 ⁸ / ₂
29. Selkirk, - - -	2	13	5 ³ / ₂	1	4	5 ¹⁰ / ₂	—	—	—	1	13	3 ⁷ / ₂
30. Stirling, - - -	1	17	2 ⁹ / ₂	1	3	10 ⁸ / ₂	—	—	—	1	13	11 ⁰ / ₂
31. Sutherland, - -	2	0	0 ¹ / ₂	1	3	6 ¹ / ₂	1	1	3 ¹ / ₂	1	13	1 ⁶ / ₂
32. Wigtown, - - -	1	16	3 ⁸ / ₂	1	1	6 ⁷ / ₂	1	8	3 ⁷ / ₂	1	12	4 ¹ / ₂

SECOND SCHEDULE.

Sec. 2.

PROVISIONS RELATING TO THE COUNTY AVERAGE VALUE OF 421.
KINDS OF VICTUAL NOT MENTIONED IN THE FIRST
SCHEDULE.

A.—WHERE THE VALUE OF THE KIND OF VICTUAL IS GIVEN
IN THE OFFICIAL RETURNS OF FIARS PRICES.

1. The minister of a parish, the whole or part of whose victual stipend has been localled in any kind of victual not mentioned in the First Schedule to this Act or the clerk of the presbytery where the benefice is vacant or any heritor concerned, may apply to the Clerk of Teinds to fix the former county average value (in this Schedule referred to as the "average value") of such kind of victual. In any such application by the minister or the clerk of the presbytery the applicant shall give the names of the heritors on whose lands the whole or part of such stipend has been so localled.

2. Thereafter the average value of the kind of victual in question for the fifty years one thousand eight hundred and seventy three to one thousand nine hundred and twenty-two shall be fixed by the Clerk of Teinds by reference to the official returns of fiars prices for the county in which the parish is situated or where no value for that kind of victual as given in those returns, then by reference to the official returns of fiars prices for such other county or counties as the Clerk of Teinds may select as being most suitable in the circumstances of the case.

3. The average value as so fixed shall be intimated by the Clerk of Teinds to the minister or the clerk of the presbytery where the benefice is vacant and to the common agent of the heritors, and the Clerk of Teinds shall at the same time enter the said value in a book to be kept by him in the Teind Office for the purpose, the said book being available for inspection by any member of the public at the Teind Office during the official hours of opening thereof.

B.—WHERE THE VALUE OF THE KIND OF VICTUAL IS NOT 423, 424.
GIVEN IN THE OFFICIAL RETURNS OF FIARS PRICES.

1. The minister of a parish the whole or part of whose victual stipend has been localled in any kind of victual not mentioned in the First Schedule to this Act or the clerk of the presbytery where the benefice is vacant or any heri-

tor concerned may apply to the sheriff to fix the average value thereof.

2. The sheriff after intimation of any such application to such persons as he may appoint and after such inquiry as he thinks fit shall fix the said average value.

3. The said average value as so fixed shall be intimated by the sheriff to the Clerk of Teinds who shall enter the value in the book in paragraph 3 of Head A of this Schedule which shall be open for inspection as therein mentioned.

Sec. 4.

THIRD SCHEDULE.

FORM OF INTIMATION OF ELECTION THAT STIPEND SHALL BE STANDARDISED.

Date.

I,Minister (*or as the case may be*) of the Parish of.....in the Presbytery of.....hereby intimate that I elect that the stipend to which the Minister of the said Parish is entitled shall be standardised in accordance with the provisions of the Church of Scotland (Property and Endowments) Act, 1925.

Sec. 10.

FOURTH SCHEDULE.

445. PROVISIONS RELATING TO AUGMENTATION OF STIPEND.

1. In ascertaining the amount of the available teinds the victual teind and stipend shall be converted according to the average of the fairs prices for the five years preceding the year in which an application is made:

Provided that—

585. (a) if in the case of victual teind that average is less than the value as determined in accordance with paragraph 3 of the Fifth Schedule to this Act, the victual teind shall be converted in accordance with that paragraph; and
- (b) if in the case of victual stipend that average is less than the standard value, the victual stipend shall be converted according to the standard value.

2. Any application to the Lord Ordinary, and the localling of any augmentation, and any decree of locality following thereon shall, subject to the provisions of this Act, be made and dealt with in such manner as the Court of Session by Act of Sederunt may prescribe.

FIFTH SCHEDULE.

Sec. 11.

PROVISIONS RELATING TO THE PREPARATION, ISSUING,
AND ADJUSTMENT OF TEIND ROLLS. 101 *et seq.*,
436, 509, 534.

1. Where a benefice is actually vacant at the passing 101.
of this Act or where, after the passing of this Act, a
benefice becomes actually vacant or is deemed to have
become vacant by election or notification the clerk of the
presbytery shall forthwith intimate the vacancy to the
Clerk of Teinds, who shall communicate the intimation to
any titular who has previously notified the Clerk of Teinds
in writing that he desires to receive such intimation.

2. Where a benefice is actually vacant at the passing of 101.
this Act or where, after the passing of this Act, the benefice
becomes actually vacant or is deemed to have become vacant
by election or notification it shall be the duty of the heritors
concerned forthwith to prepare and lodge in the Teind
Office a state of teinds unless in any case the Lord Ordinary
shall on the application of any party dispense therewith.

3. For the purposes of the teind rolls the value in ster-
ling money of teind valued in victual shall be determined—

(a) where a basis of conversion has been specified in
the decree of valuation by reference to that
basis; and

(b) In any other case by reference to the former county
average value within the meaning of section
two of this Act.

4. Effect shall be given in the teind roll by the Clerk 101.
of Teinds to any augmentation of stipend or to any re-
duction of stipend following upon a surrender of teinds,
made in accordance with the provisions of the Sixth
Schedule to this Act. The Clerk of Teinds may also give
effect in a teind roll to an extra-judicial surrender made
before the passing of this Act on intimation from or
on behalf of the heritor concerned that such a surrender
has been made and on production to him of evidence
thereof.

5. Where a heritor is entered on the teind roll separately for different subjects belonging to him in the same parish for teinds of the same class only, he shall be entitled to have the said entries or some of them consolidated into one entry, and on receiving from the heritor an application to that effect before the teind roll is made final, the Clerk of Teinds shall give effect thereto.

6. Where stipend is payable to the minister of one parish from the teinds of lands situated in another parish the Clerk of Teinds shall in the teind roll of the parish where stipend is so payable specify the value of the stipend so payable, and in the teind roll of the parish wherein the lands are situated the teinds of those lands shall be stated under deduction of any stipend payable as aforesaid.

7. Where the Clerk of Teinds has prepared a teind roll for any parish he shall report the same to the Lord Ordinary who shall take the roll into consideration and make such order as he thinks fit with respect to the intimation of the roll (including where necessary an order for the appointment of a common agent by the heritors concerned) and with respect to the subsequent adjustment and completion of the roll. The date of the Lord Ordinary's interlocutor ordering intimation of the teind roll is hereinafter in this Act referred to as the "date of issue of the teind roll."

436-437. 8. Subject to the provisions of this Act relating to valuation and surrender of teinds no objection to a teind roll shall be competent unless the same is lodged with the Clerk of Teinds before the expiry of eighteen months after the date of issue of the teind roll and so soon as any such objection and any application for the valuation of teinds has been disposed of and any surrender of teinds has received effect and any necessary adjustment of the teind roll has been made, the Lord Ordinary shall by
426-427. interlocutor declare the roll to be final. As on and from the date of such interlocutor the roll shall for the purposes of this Act be final, subject to such alterations and adjustments as may be necessary in consequence of changes of ownership or in consequence of redemption.

437. 9. The Court of Session shall make by Act of Sederunt such rules and regulations as may in their judgment from time to time be necessary with respect to the preparation, reporting, adjustment, disposal and custody of the teind roll.

10. Nothing in this Act shall affect the right of the titular to lodge a state of teinds should he elect to do

so, provided that the expense of the preparation of the said state by the titular shall be payable by the titular.

SIXTH SCHEDULE.

Sec. 16.

PROVISIONS RELATING TO THE VALUATION OF TEINDS AND 104, 521.
THE SURRENDER OF VALUED TEINDS.

1. Any heritor whose teinds in any parish are wholly or partly unvalued, or the titular of any such teinds, or any minister whose stipend is wholly or partly exigible from unvalued teinds or where the benefice is vacant the General Trustees may at any time not later than the expiry of twelve months after the date of issue of the teind roll for the parish apply to the sheriff to appoint a valuer for the purpose of fixing the annual agricultural value of the lands the teinds of which have not been valued, and in estimating that value the valuer (who shall be appointed by the sheriff at his own hand) shall have regard to the following directions, that is to say: Where the lands are bona fide let for a term of years, the rent payable under the lease (so far as it represents agricultural rental) and where the lands are not so let the agricultural rent at which the lands might, in the opinion of the valuer, be reasonably expected to be let shall be deemed to be the annual agricultural value:

Provided that in either case there shall be deducted from the rent—

- (a) interest on expenditure by the heritor or his predecessors, upon permanent improvements within twenty years prior to the date of valuation, where such expenditure is shown to the satisfaction of the valuer to have increased the annual agricultural letting value of the land; and
- (b) interest on any other improvement expenditure made by the heritor or his predecessors which, in the opinion of the valuer, has increased such letting value as at the date of valuation.

2.—(a) Any heritor or titular who applies to the sheriff as aforesaid shall so soon as the appointment of a valuer has been made give written notice thereof to the minister of the parish in which the lands are situate, or if the benefice is vacant to the General Trustees, and any minis-

ter or the General Trustees so applying shall in like manner give notice to the heritor of the lands.

(b) The minister, or the General Trustees or the heritor, as the case may be, receiving such notice may within fifteen days after the date of the notice intimate in writing to the valuer that he or they desires or desire to be heard.

3. The valuer shall after such inquiry as he may think necessary, including the hearing of the parties where a desire to be heard has been intimated as aforesaid, issue a certificate of valuation showing the annual agricultural value of the lands.

4. The provisions set out in the Second Schedule to the Agricultural Holdings (Scotland) Act, 1923, relating to the removal of arbiter, evidence, statement of case and expenses shall, with the necessary modifications, apply to any inquiry by a valuer appointed by the sheriff under this Schedule. The Court of Session shall from time to time by Act of Sederunt make such regulations as they may think necessary for regulating the fees of valuers so appointed.

5.—(a) Where the annual agricultural value of the lands, as shown by the certificate issued by the valuer, does not exceed fifty pounds the certificate shall be final. Where the said value exceeds fifty pounds—

(i) The applicant for the appointment of the valuer, or the heritor, or the minister, or the General Trustees, as the case may be, interested in the valuation, if not satisfied with the said valuation, may within fifteen days after the issue of the certificate by the valuer, appeal to the Lord Ordinary, who after such inquiry as he thinks necessary (including if the Lord Ordinary so directs, a remit to a skilled valuer) may either approve or modify the certificate, and the certificate so approved or modified shall thereupon become final. In estimating the annual agricultural value of the land the Lord Ordinary shall have regard to the provisions in that behalf contained in paragraph 1 of this Schedule, which for this purpose shall apply with the substitution of the Lord Ordinary for the valuer.

(ii) If no such appeal has been intimated before the expiry of fifteen days from the issue of the certificate by the valuer, the certificate shall upon such expiry become final.

6.—(a) Where the annual agricultural value of the lands as shown in the certificate issued by the valuer does not exceed fifty pounds the applicant for the appointment of the valuer shall within ten days after the issue of the certificate lodge the same at the Teind Office for registration.

(b) Where the said value exceeds fifty pounds the certificate issued by the valuer shall be so lodged within ten days of the date when the same becomes final—

(i) by the applicant if the certificate has not been modified by the Lord Ordinary; and

(ii) by the appellant if the certificate has been so modified.

(c) When a certificate has been lodged as aforesaid the Clerk of Teinds shall issue a certificate of the amount of the valued teind and such certificate shall be recorded in the Teind Office, and when so recorded shall be evidence of the valuation to the same effect as an extract decree of valuation of the Court of Teinds issued in accordance with the present practice.

7.—(a) Any heritor or titular whose teinds have been valued either in accordance with the present practice or in accordance with the provisions of this Schedule, and whether there is or is not a depending process of locality may, so soon as the decree of valuation has been extracted or the certificate of the amount of the valued teinds has been recorded, as the case may be, and within the period hereinafter limited in that behalf, surrender the amount of such valued teind to the minister or the General Trustees, as the case may be. Such surrender shall be as nearly as may be in the form presently in use in the Court of Teinds, and if there is a process of locality pending may be embodied in a minute of surrender lodged in that process, and if there is no depending process of locality the surrender may be signed by the heritor or his agent or the titular or his agent (as the case may be) and lodged at the Teind Office. Any heritor whose teinds have been valued in accordance with the present practice may exercise the powers of this paragraph, notwithstanding that such valuation comprises the teinds of a heritor other than the heritor named in the surrender, but only where there has been an agreement between the parties interested with respect to the division of the cumulo valuation.

(b) Surrender of valued teinds shall not be competent unless the minute of surrender is lodged in a process of locality or the surrender is lodged at the Teind

Office as aforesaid before the date hereinafter mentioned (that is to say) :—

- (i) In cases where the teinds are valued before the date of issue of the teind roll for the parish in which the lands are situate, before the expiry of six months after the date of the said issue; and
 - (ii) In cases where the teinds are valued after the date of issue of the teind roll for the parish in which the lands are situate, before the expiry of two months after the issue by the Clerk of Teinds of a certificate of the amount of the valued teinds; and
 - (iii) In cases where the value of teinds specified in the teind roll for the parish in which the lands are situate is deemed to be accepted by acquiescence as hereinbefore in this Act provided, before the expiry of fifteen months after the date of issue of the teind roll for that parish.
- (c) The heritor or the titular shall at the same time as the minute of surrender or the surrender, as the case may be, is lodged as aforesaid send a copy thereof to the minister of the parish, or if the benefice is vacant to the General Trustees, and the Clerk of Teinds shall, as soon as may be after the lodging of the minute or of the surrender, examine the state of the teinds in the parish and calculate what deficiency of stipend (if any) would ensue if the surrender took effect, and shall notify the result of his examination and calculation to the minister or to the General Trustees, as the case may be. Within twenty-one days after the date of such notification the minister or the General Trustees, as the case may be, may lodge objections to the surrender, which shall be finally disposed of by the Lord Ordinary; but if no such objection shall be so lodged the surrender shall have effect at the expiry of the said period of twenty-one days.

(d) It shall not be a valid objection to a surrender made under the provisions of this Schedule that the decree of locality on which the stipend has been paid up to the date of the surrender has not been made final.

8. Where a surrender made under the provisions of this Schedule has become effectual, whether no objection has been lodged or any objection lodged has been disposed of, and a deficiency of stipend amounting to not less than ten pounds per annum is caused thereby, the minister of the parish, or if the benefice is vacant the General Trustees may within thirty days after the date when the surrender

has become effectual, intimate in writing to the Clerk of Teinds that he or they claims or claim that the deficiency of stipend shall be re-allocated among those heritors in the parish (if any) who have unexhausted teinds not yet allocated for stipend. The Clerk of Teinds on receiving intimation of the claim shall notify the same to the common agent of the heritors, and if any heritor within thirty days after the date of such notification lodges with the Clerk of Teinds a written objection to the claim the matter shall be finally disposed of by the Lord Ordinary. But if no such objection be lodged, the re-allocation shall be made by the Clerk of Teinds, who shall issue to the minister or to the General Trustees, as the case may be, a certificate specifying the amounts of stipend payable by the heritors whose teinds are affected by the re-allocation.

9. Any calculation as to the amount of any deficiency of stipend caused by a surrender in accordance with the provisions of this Schedule or as to the amounts of unexhausted teinds available to meet such deficiency shall be made—

- (a) So far as the stipend is concerned, on the basis of the standard value thereof; and
- (b) so far as the value of the teind is concerned, in accordance with paragraph 3 of the Fifth Schedule to this Act.

10. A heritor may have his unvalued teinds valued or surrender valued teinds in accordance with the provisions of this Schedule, whether he has or has not a heritable right to such teinds;

Provided that—

- (a) Where the heritor proposes to have valued or to surrender any teinds to which he has no heritable right, he shall at the time when he gives notice of the appointment of a valuer or lodges a minute of surrender or a surrender as afore-said intimate the appointment or the surrender in writing to the titular of the teinds, who shall have the same rights of objection and appeal as are by the provisions of this Schedule conferred upon the minister of the parish or the General Trustees;
- (b) When a heritor receives from a minister or the General Trustees notice of the appointment of a valuer with respect to lands to the teinds of which he has no heritable right, he shall forthwith intimate the appointment in writing to the titular of the teinds, who shall in such

case have the same rights of objection and appeal as are by the provisions of this Schedule conferred upon the heritor.

Secs. 19 and
39.

SEVENTH SCHEDULE.

519. PAYMENTS OUT OF THE CONSOLIDATED FUND.

(1) The annual sum of 12,000*l.* on account of augmentations of stipends chargeable on and payable out of the Consolidated Fund of the United Kingdom, under the Teinds Act, 1810, and the Teinds Act, 1824.

(2) The annual sum of 5,040*l.* on account of stipends, chargeable and payable, as aforesaid, under the Act 5 George IV. chapter 90.

(3) The annual sum of 2,000*l.* chargeable and payable as aforesaid to the General Assembly for itinerant preachers.

(4) The annual sum of 1,100*l.* chargeable and payable as aforesaid towards the expenses of the General Assembly.

(5) The annual sum of 86*l.* 3*s.* 1*d.* land revenue allowances, chargeable and payable as aforesaid to certain precentors and ministers.

(6) The annual payment under Royal Warrant to the minister of Dunkeld and Dowally of an amount fixed by reference to Fiars Prices, chargeable and payable as aforesaid.

Secs. 21 and
24.

EIGHTH SCHEDULE.

41, 161 *et*
seq., 367.

LIST OF CERTAIN PARISHES QUOD OMNIA ERECTED UNDER THE NEW PARISHES (SCOTLAND) ACT, 1844.

PARISH.	DATE OF ELECTION.
North Bute, - - -	26th June, 1844.
Shettleston, - - -	30th June, 1847.
Calton, - - -	11th July, 1849.
Teviothead, - - -	20th February, 1850.
Maryhill, - - -	10th July, 1850.
Kirkhope, - - -	25th June, 1851.
Springburn, - - -	14th June, 1854.
Ardoch, - - -	21st February, 1855.
Colonsay, - - -	27th February, 1861.
Coll, - - -	15th March, 1865.

NINTH SCHEDULE.

Secs. 22 and
46.

LIST OF BURGH CHURCHES.

151 *et seq.*,
369.

1. East Kirk, Aberdeen.
2. Greyfriars, Aberdeen. Manse.
3. North Kirk, Aberdeen.
4. South Kirk, Aberdeen.
5. St. Clement's, Aberdeen. Manse.
6. West Kirk, Aberdeen. Manse.
7. Greyfriars, Dumfries.
8. St. Clement's, Dundee.
9. St. David's, Dundee. Manse.
10. St. John's, Dundee.
11. St. Paul's, Dundee. Manse.
12. Canongate, Edinburgh.
13. Greenside, Edinburgh. Manse.
14. Greyfriars New, Edinburgh.
15. Greyfriars Old, Edinburgh.
16. High Kirk (St. Giles'), Edinburgh.
17. Lady Yester's, Edinburgh.
18. New North (West St. Giles'), Edinburgh. Manse.
19. St. Andrew's, Edinburgh.
20. St. George's, Edinburgh.
21. St. John's, Edinburgh.
22. St. Mary's, Edinburgh.
23. St. Stephen's, Edinburgh. Manse.
24. Trinity College, Edinburgh.
25. Tron, Edinburgh.
26. College or Blackfriars, Glasgow. Manse.
27. St. Andrew's, Glasgow.
28. St. David's or Ramshorn, Glasgow. Manse.
29. St. George's, Glasgow. Manse.
30. St. James', Glasgow.
31. St. John's, Glasgow.
32. St. Paul's, Glasgow.
33. Tron, Glasgow.
34. East Kirk, Greenock.
35. Middle Kirk, Greenock. Manse.
36. High Kirk, Kilmarnock.
37. High, Paisley. Manse.
38. Laigh, Paisley. Manse.
39. Middle, Paisley. Manse.
40. St. John's, Perth. Manse.
41. St. Paul's, Perth.
42. St. Mark's, Perth. Manse.
43. Queensferry.
44. North, Stirling.
45. West, Stirling.

Sec. 23.

TENTH SCHEDULE.

158 *et seq.*,
367.

LIST OF PARLIAMENTARY CHURCHES AND MANSES.

Name of Place.	Parish or Island.	County.
1. Lochgilphead, -	Glassary, -	Argyll.
2. Muckairn (manse only), -	Muckairn, -	do.
3. Duror, -	Appin, -	do.
4. Kilmeny (manse only), -	Islay Island, -	do.
5. Portnahaven, -	do., -	do.
6. Oe or Oth, -	do., -	do.
7. Kinlochspelve, -	Mull Island, -	do.
8. Salen (manse only), -	do., -	do.
9. Tobermory, -	do., -	do.
10. Ulva, -	Ulva Isle, -	do.
11. Iona, -	Iona Isle, -	do.
12. Strontian, -	Ardnamurchan, -	do.
13. Acharacle, -	do., -	do.
14. North Ballachulish, -	Kilmallie, -	Inverness.
15. Ardgour (no manse), -	do., -	Argyll.
16. Rothiemurchus (manse only), -	Rothiemurchus, -	Inverness.
17. Tomintoul, -	Kirkmichael, -	Banff.
18. Inch (manse only), -	Kingussie, -	Inverness.
19. Steinsholl (in Trotternish), -	Skye Island, -	do.
20. Halen (in Waternish), -	do., -	do.
21. Trumisgarry, -	N. Uist Isle, -	do.
22. Bernera Isle, -	Harris, -	do.
23. Plockton, -	Lochalsh, -	Ross and Cromarty.
24. Shieldaig, -	Applecross, -	do.
25. Carnoch, Strath-Conan, -	Contin, -	do.
26. Kinloch-Luichart, -	do., -	do.
27. Poolewe, -	Gairloch, -	do.
28. Croich, -	Kincardine, -	do.
29. Ullapool, -	Loch Broom, -	do.
30. Cross (Ness District), -	Lewis Island, -	do.
31. Knock (Eye District), -	do., -	do.
32. Rhuistore, -	Assynt, -	Sutherland.
33. Kinloch-Bervie, -	Edrachilles, -	do.
34. Strathy, -	Farr, -	do.
35. Berriedale, -	Latheron, -	Caithness.
36. Keiss, -	Wick, -	do.
37. Deerness (manse only), -	St. Andrew and Deerness, -	Orkney and Shetland.
38. N. Ronaldshay (manse only), -	Cross and Burness, -	do.
39. Sandwick (manse only), -	Dunrossness, -	do.
40. Quarff, -	Quarff, -	do.
41. Interwick, or Innerwick (in Glenlyon), -	Fortingall, -	Perth.
42. Rannoch, -	do., -	do.
43. Kirktown of Foss, -	Dull, -	do.

ELEVENTH SCHEDULE.

Sec. 28.

CERTIFICATE OF SHERIFF UNDER THE CHURCH OF SCOTLAND 107, 142.
(PROPERTY AND ENDOWMENTS) ACT, 1925.

County of
Parish of

I, _____, sheriff of _____,
as authorised by the Church of Scotland (Property and
Endowments) Act, 1925, hereby certify that all obliga-
tions incumbent on the heritors of the said parish, with
respect to the subjects mentioned in the Schedule annexed
hereto have been fulfilled.

[Signature and date.]

SCHEDULE.

Church or manse

*(Insert or refer to a description of the church, and the
site thereof, or the manse (with pertinents, if
any) and the site thereof, or both of the said
subjects (as the case may be) to which the certi-
ficate relates.)*

TWELFTH SCHEDULE.

Sec. 48.

ENACTMENTS REPEALED.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
50 Geo. III. c. 84.	The Teinds Act, 1810, -	The whole Act.
5 Geo. IV. c. 72.	The Teinds Act, 1824, -	The whole Act.
5 Geo. IV. c. 90.	An Act to amend an Act for building additional Places of Worship in the Highlands and Islands of Scotland.	Sections 13 and 14, so far as those sections relate to payment of stipend, sections 23 and 24.
8 & 9 Vict. c. 83.	The Poor Law (Scotland) Act, 1845.	Section 54, from "provided also" to the end of the section. 111, 471.
17 & 18 Vict. c. 80.	The Registration of Births, Deaths, and Marriages (Scotland) Act, 1854.	Section 13.

FORM OF MEMORANDUM OF ALLOCATION.

The proportion of the annual sum of £ created
by (*particulars of deed*) allocated upon all and whole
(*description of land*) is hereby fixed at £ (and
if an increase is payable, add) with £ of increase
making a total of £ per annum.

[*To be signed by minister or trustees under deed of constitution or the General Trustees, as the case may be, or by an agent on behalf of the minister or trustees or General Trustees, respectively.*]

APPENDIX II.

ACTS OF GENERAL ASSEMBLY AND ORDER IN
COUNCIL CONSEQUENT ON THE ACTS OF 1921
AND 1925.

(i) ACT VII. OF THE LEGISLATIVE ACTS PASSED
BY THE GENERAL ASSEMBLY OF THE CHURCH
OF SCOTLAND OF 1926.

*Act adopting Articles Declaratory of the Constitution of
the Church of Scotland in Matters Spiritual.*

Sess. 4.

EDINBURGH, 3rd June, 1926.

THE Articles Declaratory of the Constitution of the Church of Scotland in matters spiritual sent down as an overture, having been approved by a majority of the Presbyteries of the Church, the General Assembly did and hereby do convert the same into a standing law of the Church.

The tenor of the Act is as follows:—

I. The Church of Scotland is part of the Holy Catholic or Universal Church; worshipping one God, Almighty, all-wise, and all-loving, in the Trinity of the Father, the Son, and the Holy Ghost, the same in substance, equal in power and glory; adoring the Father, infinite in Majesty, of whom are all things; confessing our Lord Jesus Christ, the Eternal Son, made very man for our salvation; glory-

ing in His Cross and Resurrection, and owning obedience to Him as the Head over all things to His Church; trusting in the promised renewal and guidance of the Holy Spirit; proclaiming the forgiveness of sins and acceptance with God through faith in Christ, and the gift of Eternal life; and labouring for the advancement of the Kingdom of God throughout the world. The Church of Scotland adheres to the Scottish Reformation; receives the Word of God which is contained in the Scriptures of the Old and New Testaments as its supreme rule of faith and life; and avows the fundamental doctrines of the Catholic faith founded thereupon.

II. The principal subordinate standard of the Church of Scotland is the Westminster Confession of Faith approved by the General Assembly of 1647, containing the sum and substance of the Faith of the Reformed Church. Its government is Presbyterian, and is exercised through Kirk Sessions, Presbyteries, Provincial Synods, and General Assemblies. Its system and principles of worship, orders, and discipline are in accordance with "The Directory for the Public Worship of God," "The Form of Presbyterial Church Government," and "The Form of Process," as these have been or may hereafter be interpreted or modified by Acts of the General Assembly or by consuetude.

III. This Church is in historical continuity with the Church of Scotland which was reformed in 1560, whose liberties were ratified in 1592, and for whose security provision was made in the Treaty of Union of 1707. The continuity and identity of the Church of Scotland are not prejudiced by the adoption of these Articles. As a national Church representative of the Christian Faith of the Scottish people it acknowledges its distinctive call and duty to bring the ordinances of religion to the people in every parish of Scotland through a territorial ministry.

IV. This Church, as part of the Universal Church ^{13, 211, 315,} wherein the Lord Jesus Christ has appointed a govern- ^{463, 467.}ment in the hands of Church office-bearers, receives from Him, its Divine King and Head, and from Him alone, the right and power subject to no civil authority to legislate, and to adjudicate finally, in all matters of doctrine, worship, government, and discipline in the Church, including the right to determine all questions concerning membership and office in the Church, the constitution and membership of its Courts, and the mode of election of its office-bearers, and to define the boundaries of the spheres of labour of its ministers and other office-bearers. Recognition by civil authority of the separate and inde-

pendent government and jurisdiction of this Church in matters spiritual, in whatever manner such recognition be expressed, does not in any way affect the character of this government and jurisdiction as derived from the Divine Head of the Church alone, or give to the civil authority any right of interference with the proceedings or judgments of the Church within the sphere of its spiritual government and jurisdiction.

V. This Church has the inherent right, free from interference by civil authority, but under the safeguards for deliberate action and legislation provided by the Church itself, to frame or adopt its subordinate standards, to declare the sense in which it understands its Confession of Faith, to modify the forms of expression therein, or to formulate other doctrinal statements, and to define the relation thereto of its office-bearers and members, but always in agreement with the Word of God and the fundamental doctrines of the Christian Faith contained in the said Confession, of which agreement the Church shall be sole judge, and with due regard to liberty of opinion in points which do not enter into the substance of the Faith.

VI. This Church acknowledges the divine appointment and authority of the civil magistrate within his own sphere, and maintains its historic testimony to the duty of the nation acting in its corporate capacity to render homage to God, to acknowledge the Lord Jesus Christ to be King over the nations, to obey His laws, to reverence His ordinances, to honour His Church, and to promote in all appropriate ways the Kingdom of God. The Church and the State owe mutual duties to each other, and acting within their respective spheres may signally promote each other's welfare. The Church and the State have the right to determine each for itself all questions concerning the extent and the continuance of their mutual relations in the discharge of these duties and the obligations arising therefrom.

VII. The Church of Scotland, believing it to be the will of Christ that His disciples should be all one in the Father and in Him, that the world may believe that the Father has sent Him, recognises the obligation to seek and promote union with other Churches in which it finds the Word to be purely preached, the sacraments administered according to Christ's ordinance, and discipline rightly exercised; and it has the right to unite with any such Church without loss of its identity on terms which this Church finds to be consistent with these Articles.

VIII. The Church has the right to interpret these Articles, and, subject to the safeguards for deliberate action and legislation provided by the Church itself, to

modify or add to them; but always consistently with the provisions of the first Article hereof, adherence to which, as interpreted by the Church, is essential to its continuity and corporate life. Any proposal for a modification or addition to these Articles which may be approved of by the General Assembly shall, before it can be enacted by the Assembly, be transmitted by way of overture to Presbyteries in at least two immediately successive years. If the overture shall receive the approval, with or without suggested amendment, of two-thirds of the whole of the Presbyteries of the Church, the Assembly may revise the overture in the light of any suggestions by Presbyteries, and may transmit the overture when so revised to Presbyteries for their consent. If the overture as transmitted in its final form shall receive the consent of not less than two-thirds of the whole of the Presbyteries of the Church, the General Assembly may, if it deems it expedient, modify or add to these Articles in terms of the said overture. But if the overture as transmitted in its final form shall not receive the requisite consent, the same or a similar proposal shall not be again transmitted for the consent of Presbyteries until an interval of five years after the failure to obtain the requisite consent has been reported to the General Assembly.

IX. Subject to the provisions of the foregoing Articles and the powers of amendment therein contained, the Constitution of the Church of Scotland in matters spiritual is hereby anew ratified and confirmed by the Church.

(ii) ORDER IN COUNCIL PURSUANT TO THE	Statutory
CHURCH OF SCOTLAND ACT, 1921.	Rules and
11 and 12 Geo. V. c. 29.	Orders, 1926,
	841
	No. <u>31.</u>

CHURCH OF SCOTLAND.

THE CHURCH OF SCOTLAND ORDER IN COUNCIL, 1926. 35.

At the Court at Buckingham Palace, the 28th day of June,
1926.

Present,

The King's Most Excellent Majesty in Council.

Whereas it is provided by the Church of Scotland Act, 11 & 12 1921, 11 and 12 Geo. V. c. 29 (hereinafter referred to as Geo. V. the Act), that the Act shall come into operation on such c. 29.

date as His Majesty may fix by Order in Council after the Declaratory Articles shall have been adopted by an Act of the General Assembly of the Church of Scotland with the consent of a majority of the Presbyteries of the Church:

And whereas the said Declaratory Articles have been adopted by an Act of the General Assembly of the Church of Scotland with the consent of a majority of the Presbyteries of the Church:

Now, therefore, His Majesty is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows:—

1. This Order may be cited as the Church of Scotland Order in Council, 1926.

2. The 28th day of June, 1926, is hereby fixed as the date on which the Act shall come into operation.

M. P. A. HANKEY.

14. (iii) ACT XIV. OF THE LEGISLATIVE ACTS PASSED BY THE GENERAL ASSEMBLY OF THE CHURCH OF SCOTLAND OF 1927: ANENT THE POWER OF PRESBYTERIES TO SUSPEND PROCEEDINGS TOWARDS THE ELECTION AND APPOINTMENT OF MINISTERS.

Sess. 6.

EDINBURGH, 28th May, 1927.

The General Assembly, with consent of a majority of the Presbyteries of the Church, enact and ordain that in any case of a vacancy occurring in a Parish where, in the opinion of the Presbytery, it is advisable that the suppression of the Charge, or the uniting of the Parish with another Parish, or that the expediency of a working arrangement with the United Free Church in relation to such Charge or Parish should be considered by the Special Commission on the Financial Position of the Church, appointed by the General Assembly on the ninth day of June, 1926, it shall be in the power of the Presbytery, on due notice being given to the congregation concerned, to suspend all proceedings towards the election and appointment of a Minister to the said Church and Parish, until after the General Assembly, or the Commission thereof, shall have given a Deliverance upon the matter on a Report by the Special Commission, or until it shall have been agreed by the Presbytery, with the concurrence of the Special Commission, that it is inadvisable to take any further steps towards either the suppression of the Charge, or the uniting of the Parishes under consideration, or the

initiation of a working arrangement with the United Free Church in relation thereto.

APPENDIX III.

ACTS OF SEDERUNT INCIDENTAL TO THE CHURCH
OF SCOTLAND (PROPERTY AND ENDOWMENTS)
ACT, 1925.

ACT OF SEDERUNT ANENT THE VALUE OF WHEAT, OATS AND BEAR WITHIN THE MEANING OF THE CHURCH OF SCOTLAND (PROPERTY AND ENDOWMENTS) ACT, 1925, SECTION 2 (1), AND FIRST SCHEDULE, TABLE B. Statutory Rules and Orders, 1925, No. $\frac{1061}{s. 70}$.

EDINBURGH, 16th July, 1925.

THE LORDS OF COUNCIL and SESSION, having taken into consideration the terms of Section 2 (1) (a) of the Church of Scotland (Property and Endowments) Act, 1925, with reference to the ascertainment of the former county average value of the kinds of victual hereinafter mentioned and also the terms of the First Schedule of the said Act, Enact and Declare as follows:—

1. The former county average value (within the meaning of Section 2 (1) of the said Act) of Wheat per quarter shall be deemed to be:—

(a) For the County of Caithness, - -	£2 0 0
(b) For the County of Orkney, - -	2 0 0

2. The former county average value (within the meaning of Section 2 (1) of the said Act) of Oats per quarter shall be deemed to be:—

For the County of Orkney, - -	£1 0 3
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3. The former county average value (within the meaning of Section 2 (1) of the said Act) of Bear per quarter shall be deemed to be:—

(a) For the County of Berwick, - -	£1 10 8
(b) For the County of Clackmannan, -	1 8 6
(c) For the County of Dumfries, -	1 9 10
(d) For the County of Edinburgh or Midlothian, - - - -	1 10 11
(e) For the County of Elgin or Moray, -	1 9 10
(f) For the County of Haddington or East Lothian, - - - -	1 15 0

(g) For the County of Kinross, - -	£1	7	5
(h) For the County of Kirkcudbright, -	1	9	5
(i) For the County of Lanark, - -	1	10	5
(j) For the County of Linlithgow or West Lothian, - - - -	1	10	0
(k) For the County of Nairn, - - -	1	9	10
(l) For the County of Peebles, - -	1	11	0
(m) For the County of Perth, - - -	1	8	1
(n) For the County of Renfrew, - -	1	10	6
(o) For the County of Ross and Cromarty, -	1	11	6
(p) For the County of Roxburgh, - -	1	9	9
(q) For the County of Selkirk, - -	1	9	0
(r) For the County of Stirling, - -	1	9	6

And the Lords Appoint this Act to be entered in the Books of Sederunt, and to be printed and published in common form.

J. A. CLYDE, *I.P.D.*

Statutory
Rules and
Orders, 1925,
No. 1062
s. 71.

TEINDS, COURT OF, SCOTLAND.

PROCEDURE.

(Printed as amended by S.R. & O. 1925, No. 1663.¹)

369, 446.

ACT OF SEDERUNT FOR REGULATING THE PROCEDURE UNDER SECTION 10 AND SCHEDULE 4 OF THE CHURCH OF SCOTLAND (PROPERTY AND ENDOWMENTS) ACT, 1925 (15 AND 16 GEO. V. c. 33), AND FOR OTHER PURPOSES.

EDINBURGH, 17th July, 1925.

S.R. & O.
1913,
No. 638
s. 44.

THE LORDS of COUNCIL and SESSION, in pursuance of the powers vested in them by the Act of Parliament 15 and 16 Geo V. c. 33, entitled "An Act to amend the law relating to Teinds and to the Stipends of Ministers of the Church of Scotland and the tenure of the Property and Endowments of that Church, and for purposes connected therewith," do hereby repeal Book H, Chapter II., of the codifying Act of Sederunt without prejudice to any application for augmentation competently made before the passing of the said Act, or to anything following on such application or done therein, and Enact and Declare as follows:—

Sittings of Teind Court.—1. That the Court of the Commissioners for Teinds shall meet once a fortnight on Friday during the sitting of the Court of Session at such hours as shall be convenient.

¹ Not separately printed in S.R. & O. series. For the amendments, see footnotes to Schedule A.

AUGMENTATION, MODIFICATION AND LOCALITY.

[Section 10, 15 & 16 Geo. V. c. 33.]

1. *Applications under Section 10, 15 & 16 Geo. V. c. 33.*—Applications under section 10 may be made by way of summons to the Court of Teinds. The pursuer shall state in the summons as accurately as he can the date when the last application for an augmentation was made, the number of chalders modified in stipend by the Court, the value of same (including any allowance for furnishing communion elements), calculated in accordance with the provisions of the Fourth Schedule of the statute, and the surplus teinds which the pursuer believes to be available to allow of augmentation in terms of the statute, and may be in the form of Schedule A hereto annexed.

2. *Citation and Notice.*—(a) As soon as a summons of modification and locality is raised and signeted, it shall be competent to the pursuer to cite the titulars and tacksmen of the teinds, heritors and liferenters, and all others having, or pretending to have, interest in the teinds of the parish, by a notice in writing affixed to the most patent door of the church, by the clerk of the kirk session or a police constable, stating that the minister of the parish has raised a summons of modification and locality of his stipend which will be called in Court on _____, being the _____ day of _____ next to come, not being less than six weeks after the date of the notice; and such clerk or constable shall return a certificate, subscribed by himself and two witnesses, that such notice has been affixed by him.

(b) The pursuer shall also cause notice to be inserted, two several days in the *Scotsman* newspaper, and in a newspaper circulating in the county in which the parish referred to in such notice is situated, that he has raised a summons of modification and locality which will be called in Court on _____, being the _____ day of _____, not being less than six weeks from the date of the first advertisement.

(c) The mode of citation and the *inducia* above mentioned shall be deemed sufficient although one or more of the defenders shall be a pupil or minor out of the kingdom at the time such citation shall be given.

3. *Citation of Crown.*—When it is necessary to call the Lord Advocate on behalf of His Majesty or of the Crown, or any public department, he shall be cited upon the *inducia* of six weeks.

4. *Certificates and Executions of Citation*.—Such Certificate by the clerk or constable, with the notices in the newspapers above mentioned or certificate by the pursuer's agents of the due appearance in the requisite newspapers of such notices, and execution of citation to the Lord Advocate, shall be held as sufficient citation to all parties.

5. *Death of a Defender*.—When any of the defenders die during the dependence of the process, his heir may be called by a diligence in the manner and upon the *induciæ* hitherto used; but such diligence may be executed either by a messenger-at-arms or a constable or under the provision of the Citation Amendment (Scotland) Act, 1882.

45 & 46 Vict.
c. 77.

6. *Wakening of Process*.—When it is necessary to waken a process, it must be done by a summons or by a minute of wakening, in which all parties having interest must be called in the same manner, and on the same *induciæ* as in the original process.

7. *Note of Stipend and Rental to be Lodged*.—The pursuer of every process of modification and locality shall, as soon as the summons is signeted, lodge with the clerk of Court a note, stating the amount of the stipend, distinguishing how much is paid in money, and how much in victual, and in what species of victual, and the measure by which it is paid; and also stating the amount of the communion elements. The pursuer must also, at the same time, produce a rental of the parish, distinguishing the rent of each heritor.

8. *First Enrolment*.—As soon as the summons is called in Court the pursuer may enrol it in the Teind Motion Roll of the Lord Ordinary; and all concerned will be allowed to see the summons and writings therewith produced in the clerk's hands for fourteen days.

9. *Second Enrolment*.—After the elapse of the time for seeing, the pursuer may enrol the cause for a remit to the clerk to report whether there are any surplus teinds in the parish.

10. *Third Enrolment*.—When the clerk's report is prepared, the pursuer may enrol the cause to consider same and thereupon—

(a) If the clerk has reported that there appear to be no surplus teinds in the parish the Lord Ordinary may either pronounce a decree accordingly, or ordain the pursuer to lodge a condescendence giving detailed particulars of the

surplus teinds in the parish alleged in the summons to be available for an augmentation in terms of the statute.

(b) If it shall appear that there are surplus teinds in the parish the Lord Ordinary shall find in general terms accordingly, and, at the same time, shall ordain the heritors or their agents to meet for the purpose of naming a person to be suggested to the Lord Ordinary as common agent for conducting the locality, and a short notice of this interlocutor shall be inserted in the *Scotsman* newspaper, and in a newspaper circulating in the county in which the parish referred to in said notice is situated, the expense thereof to be paid by the common agent out of the general fund (unless in any case the appointment of a common agent shall be dispensed with by the Lord Ordinary); and shall further ordain the heritors to produce their rights to their teinds, if they any have, in the hands of the clerk within a time to be specified in the interlocutor, not being less than three months from the date thereof; with certification that after the elapse of that time, a remit shall be made to the clerk to prepare a scheme of locality either according to the rental lodged by the pursuer in case no rights are produced, or according to the State of Teinds lodged by the common agent (or by their heritors, as the case may be) as to the rights and interests which are produced by the heritors.

(c) The Lord Ordinary may pronounce such other or further order as shall seem to him to be necessary or expedient.

11. *Agent for Party may not be Common Agent.*—No person who is agent for the minister or titular, or for any heritor in the parish shall be appointed common agent.

12. *Common Agent to prepare State of Teinds.*—The common agent, after his nomination has been confirmed by the Court (or the heritors, as the case may be), on the expiry of the time specified within which the heritors shall produce their rights to their teinds, shall prepare and lodge a State of Teinds.

13. *Preparation of Locality before the Lord Ordinary.*—After the elapse of the time for the heritors producing their rights to teinds, a remit shall be made to the clerk to prepare a scheme of locality, either according to the rental lodged by the pursuer, in case no rights are produced, or according to the State of Teinds lodged by the common agent (or by the heritors, as the case may be), in terms of the 10th section of the statute; and this scheme so prepared shall immediately be approved by the Lord Ordinary

as an interim scheme, according to which the minister's stipend shall be paid, until a final locality shall be settled, and the minister furnished by the common agent (or by the heritors, as the case may be) with an extracted decree, at the expense of the heritors, and for which he is entitled to take credit in his account.

14. *Preparation and Approval of Rectified Locality.*—If it shall appear, at any period or periods, that, under an interim locality, prepared and approved of in terms of the foresaid provisions, the minister is unable through surrender of teinds or other causes affecting its efficacy to operate payment to any considerable extent of the stipend awarded to him, then and in that case it shall be competent to the Lord Ordinary, on the motion of the minister or other party interested, to appoint a new interim scheme of locality to be prepared, and also a state of arrears remaining due from the causes before specified, to be made up; and when the said rectified locality and state of arrears shall be approved of, the Lord Ordinary shall give decret for the arrears, and the rectified locality shall subsist as a new interim rule of payment of the stipend then current, and until it be set aside by any other rule which may afterwards be granted, on cause shown.

15. *Heritors' Motion for Rectified Locality.*—Under the reservation after provided as to expenses, it shall be competent to any heritor or heritors, the state of whose teinds has been materially altered by decreets of valuation, or by other circumstances, which may have occurred subsequent to the approval of an interim scheme, to apply for a rectification of the locality, giving effect to the new or corrected State of Teinds; and when the rectified locality shall be approved of by the Lord Ordinary as a new rule of payment, he shall, at the same time, appoint a state of arrears to be prepared, if the state of the process and the interests of the parties render this necessary, with power to him to give decret for the same.

16. *New Interim Scheme on Account of Surrenders.*—Where any new interim scheme or schemes shall be rendered necessary by surrenders, or by production of rights made by heritors, or by any other unexpected emergency occurring subsequent to the previous interim scheme or schemes, it shall be competent to the Lord Ordinary to lay the expense of the new interim scheme and state of arrears, or such part thereof as may appear proper, on the party whose surrender, or productions or proceedings as aforesaid, shall make such new interim scheme necessary, unless such heritor or heritors shall be able to instruct a reasonable cause to the contrary to the satisfaction of the Lord

Ordinary; in which last case the expense shall be defrayed by the common agent (if any).

17. *Preparation of Final Locality.*—That as soon as proceedings with regard to the interim locality are concluded, a scheme of a final locality shall be forthwith prepared, and the common agent shall distribute copies of this state and scheme among the agents for the heritors, as soon as may be after such state and scheme are prepared; and no new production shall thereafter be received, except upon payment of such expenses as may be occasioned by such new production, to be modified by the Lord Ordinary.

18. *Disposal of Objections to Final Locality.*—After the foresaid state and scheme shall have been distributed among the heritors, the Lord Ordinary shall ordain objections thereto to be given in by any of the heritors who think themselves aggrieved by the proposed mode of allocation; and the Lord Ordinary may either hear parties *viva voce* upon such objections, and the answers that may be made thereto at the bar; or he may, if he shall see cause, allow all concerned to give in written answers to such objections within such time as he shall think proper to appoint, and shall thereafter proceed, in so far as regards any application for prorogating the time for giving in papers, in the manner directed by sec. 12 of the Court of Session Act, 6 Geo. IV. c. 120.
1825.

19. *Review of Lord Ordinary's Judgment.*—When the Lord Ordinary has pronounced a judgment, other than a finding or decree as to surplus teinds, it may be reviewed by the Division to which the cause belongs by giving in a note, which must be lodged within twenty-one days after the date of the judgment complained of, and the procedure on that note shall be the same as in reviewing judgments of a Lord Ordinary in the Court of Session.

20. *Form of Extract of Decrees of Locality and Warrants of Charge.*—Decrees of locality and warrants of charge shall be issued, in the form and to the effect of the schedules B and C respectively hereto annexed, as nearly as the circumstances of each case may admit of: Reserving always right to parties so advised, to take full extracts, according to the ancient form, when they require the same, in terms of the statute; Provided also, that the dues of extract in whatever form the same may be given out, shall be charged in precise conformity with the statute.

And the Lords Appoint this Act to be inserted in the Books of Sederunt and to be printed and published in common form.
J. A. CLYDE, *I.P.D.*

SCHEDULES REFERRED TO.

SCHEDULE A

Summons of Modification and Locality.²

GEORGE THE FIFTH, &C.—Whereas it is humbly meant and shown to us by our lovite(s), The Reverend (name), the present Minister of the Parish of in the Presbytery of and County of ,—Pursuer; That the last application for an augmentation of the stipend of this parish was made on (*being the date of the signeting of the summons*): That the augmentation then granted was chalders in addition to the then old stipend and allowance for furnishing the communion elements, making the amount of the present stipend, as last modified by the Court of Teinds, chalders, with £ for furnishing the communion elements (*or as the case may be*), which modified stipend was found, in the Decree of Locality following upon said modification to be equivalent to (B. ...F. ...P. ...L. ...) of meal, (B. ...F. ...P. ...L. ...) of barley and £ money sterling, inclusive of the allowance for communion elements (*state precisely the totals of the different kinds of victual and of the money*): That the value thereof, converted into money according to the provisions of the Fourth Schedule of the Act, 15 and 16 Geo. V. c. 33,³ is £ : That after deducting the said sum of £ there are, according to the State of Teinds in the last locality process (*or otherwise as the pursuer may specifically condescend*), surplus teinds in the parish amounting to £ or thereby available for an augmentation of the pursuer's stipend: That the following are the whole parties whom it is necessary to call as defenders in the present action, *videlicet*:—(*Here insert the names and designations of the defenders, specifying the characters in which they are called*): THEREFORE the Lords of our Council and Session, Commissioners appointed for Plantation of Kirks and Valuation of Teinds per the Lord Ordinary in Teind causes, OUGHT and SHOULD find that there are surplus teinds in the parish available for an augmentation of the pursuer's stipend in accordance with the provisions of section 10 of the last-mentioned Act, and OUGHT and SHOULD modify, settle and appoint a constant local stipend, with the allowance for furnishing communion elements, to the pursuer and his successors in right of the emoluments of the cure of said parish, and establish and proportion a locality of the same, and DECERN for payment thereof to the pursuer and his successors in right of the emoluments of the cure of said parish against the heritors, titulars, tacksmen and others, intromitters with the rents and teinds of the said parish, and that at the terms following, *videlicet*:—the money stipend and allowance for furnishing the communion elements at Whitsunday and Martinmas yearly, by equal portions, and the value of the victual in money according to the highest fiars prices of the same in the county of between Yule and Candlemas yearly, after the separation of the crop from the ground, or as soon thereafter as the said fiars prices shall have been struck, beginning the first payment thereof at Whitsunday (*next*) for one-half of the said money, and the other half at Martinmas thereafter, and the value of the victual betwixt Yule and Candlemas (*next*), or as soon thereafter

² Note.—When the Church of Scotland General Trustees are the Pursuers or the pursuer's stipend has been standardised, this form may be applied *mutatis mutandis*.

³ "Act, 15 & 16 Geo. V. c. 33" substituted for "last-mentioned Act" by Act of Sederunt of October 20, 1925 (S.R. & O. 1925, No. 1063).

as the said fiars prices shall have been struck for crop and year ; and so forth, yearly and termly thereafter, in all time coming; and for the greater expedition the pursuer is willing to refer the verity of the rental of the parish herewith produced to the heritors' oaths *simpliciter*, instead of all further probation; and in case of any of the said defenders appearing and occasioning unnecessary expense to the pursuer in the process to follow hereon, such defender or defenders OUGHT and SHOULD be DECERNED and ORDAINED, by decree foresaid; to make payment to the pursuer of the sum of £100 sterling, or of such other sum as our said Lords shall modify, as the expenses of the process to follow hereon, besides the dues of extract, conform to the Acts of Parliament thereanent,⁴ writs libelled, laws, and daily practice of Scotland, used and observed in the like cases, as is alleged.—OUR WILL is HEREOF, and we charge you that on sight hereof ye pass, and in our name and authority lawfully SUMMON, WARN and CHARGE the defenders, personally or at their respective dwelling-places, if within Scotland upon six days' warning, and if in Orkney or Shetland upon forty days' warning, and if furth of Scotland by delivering a copy hereof at the office of the Keeper of the Record of Edictal Citations at Edinburgh, in terms of the statute and Act of Sederunt thereanent, and that upon sixty days' warning; and the tutors and curators or other guardians of such of the defenders as are minors, if they any have, for their interest, also at the said office of the Keeper of the Record of Edictal Citations at Edinburgh, on the same *inducie* as the minors themselves, or by the notices and in the forms prescribed by the Statute 15 and 16 Geo. V. c. 33, and relative Acts of Sederunt, and that upon six weeks' warning; and all others having or pretending to have interest in the said matter, to compear before our said Lords Commissioners for Plantation of Kirks and Valuation of Teinds, at Edinburgh, or where they may then happen to be for the time, the day of Nineteen hundred and , in the hour of cause, with continuation of days, to answer at the instance of the pursuer in the matter libelled: That is to say, the defenders to hear and see the premises verified and proven, and decree and sentence pronounced, conform to the conclusions above written, in all points, or else to allege a reasonable cause in the contrary, with certification as effeirs.—According to Justice, as ye shall answer to us thereupon: Which to do we commit to you and each of you full power by these our letters, delivering them by you duly executed and endorsed again to the bearer.—Given under our signet at Edinburgh, the day of in the year of our reign, 19 .

(To be signed by the Clerk of Teinds.)

SCHEDULE B.

*Form of Extract Decreet of Modification and Locality.*⁵

At Edinburgh, the day of Sitting in judgment, the Lords of Council and Session, Commissioners appointed for Plantation of Kirks and Valuation of Teinds, in the process of Modification and Locality raised and pursued at the instance of the Reverend Minister of the Gospel, of the

⁴ "Acts of Parliament thereanent," substituted for "foresaid Acts of Parliament" by Act of Sederunt of October 20, 1925 (S.R. & O. 1925, No. 1063).

⁵ "Acts of Parliament thereanent," substituted for "foresaid Acts of Parliament" by Act of Sederunt of October 20, 1925 (S.R. & O. 1925, No. 1063).

Parish of _____ against the Officers of State, as representing His Majesty, for the interest of the Crown, and also against the whole Heritors, Titulars, Tacksmen, Liferenters and others, intromitters with the Rents and Teinds of the said Parish, modified, decerned and ordained, and hereby modify, decern and ordain the constant Stipend and Provision of the Kirk and Parish of _____ to have been for crop, and year Nineteen hundred and _____ yearly, since and in time coming, such a quantity of Victual, half Meal, half Barley, in Imperial Weight and Measure, as shall be equal to _____ Chalders of the late Standard Weight and Measure of Scotland, payable in Money, according to the highest fiars prices of the County annually, with _____ chalders of augmentation payable in money according to the Standard Value in terms of the Act 15 and 16 Geo. V. c. 33 (or with the sum of £ _____ sterling of augmentation in terms of the Act 15 and 16 Geo. V. c. 33, being the amount of the surplus teinds in the parish available to meet *pro tanto* the statutory augmentation of _____ chalders), and that for Stipend with _____ Sterling for furnishing the Communion Elements, payable the money stipend and allowance for communion elements at Whitsunday and Martinmas yearly by equal portions, and the victual betwixt Yule and Candlemas yearly after the separation of the crop from the ground or as soon thereafter as the Fiars Prices of the County of _____ shall be struck. Which Modified Stipend, and Modification for furnishing the Communion Elements, the said Lords decern and ordain to be yearly paid to the said Kirk and Parish, by the Titulars and Tacksmen of the Teinds, Heritors and Possessors of the Lands and others, intromitters with the Rents and Teinds of the said Parish, out of the first and readiest of the Teinds, parsonage and vicarage, of the same, conform to the Division and Locality following, viz. (*the Locality to be taken in here in figures, and then say*), beginning the first term's payment thereof, for the said crop and year Nineteen hundred and _____, as at the term of Whitsunday, Nineteen hundred and _____, as regards the money stipend and communion elements, and as regards the victual stipend betwixt Yule and Candlemas, after the separation of the crop from the ground, or as soon thereafter as the fiars prices of the County are struck; and so forth yearly and termly in all time coming. The said Lords, as Commissioners foresaid, also decerned and ordained, and hereby decern and ordain, the whole Heritors of the said Parish, to make payment to _____ Common Agent in the process of their respective shares of the sum of £ _____ sterling, being the amount of the account of the taxed expenses incurred by him in obtaining the Decree of Locality; As also of their respective shares of the sum of £ _____ sterling, being the expense of Extracting this Decreet and proportioning the Expenses among the Heritors, including therein Two pounds sterling, of fee-fund dues; making in whole £ _____ sterling, and that in proportion to their several Teind Rentals in Process, and Scheme of Division made up and certified by the Clerk as relative hereto. And the said Lords of Council and Session, Commissioners foresaid, Grant Warrant to Messengers-at-Arms, in His Majesty's Name and Authority, to charge the Titulars and Tacksmen of the Teinds, Heritors, Feuars, Farmorers, Wadsetters, Liferenters, Factors, Chamberlains, Tenants, Occupiers and Possessors of the Lands and others, intromitters with the Rents and Teinds of the said Parish of _____ Defenders, personally, or at their respective dwelling-places, if within Scotland, and if furth thereof, by delivery of a Copy of Charge at the Office of the Keeper of Edictal Citations at Edinburgh, to make payment of the foresaid Stipend and Communion Element Money, each of them for his or her own

part and portion thereof, conform to the Division and Locality above set down, and that at the terms of payment above expressed—in terms and to the effect contained in the Decreet of Locality and Extract above written, and here held as repeated *brevitatis causa*; as also of their respective proportions of the foresaid sums of Expenses, and Dues of Extract, conform to the Scheme of Division above referred; to and that to the Reverend Pursuer, and his successors in right of the emoluments of the cure of said parish, and to the said Common Agent, respectively, within ten days if within Scotland, and if furth thereof, within sixty days after they are respectively charged to that effect, under the pain of Poinding, the terms of payment of said Stipend being always first come and bygone; And also Grant Warrant to Arrest the foresaid Defenders' readiest Goods, Gear, Debts, and Sums of Money, in payment and satisfaction of their respective portions of Stipend and Communion Element Money, and also of their respective proportions of the Expenses foresaid, and Dues of Extract; And if the said Defenders fail to obey the said Charge, then after the said Charge is elapsed, to Poind their readiest Goods, Gear, Debts, and other effects; and if needful for effecting the said Poinding Grant Warrant to Open all shut and lockfast places, in form as effeirs.

SCHEDULE C.

Form of Warrant of Charge in terms of Statute 1, and 2 Vict. c. 114, secs. 1 and 8.

And the said Lords, as Commissioners foresaid, Grant Warrant to Messengers-at-Arms, in His Majesty's name and authority, to charge the foresaid titulars and tacksmen of Teinds, Heritors, Feuars, Farmorers, Wadsetters, Liferenters, Factors, Chamberlains, Tenants, Occupiers and Possessors of the Lands and other intromitters with the Rents and Teinds of the said Parish of _____ personally, or at their respective dwelling-places, if within Scotland, or if furth thereof, by delivering a Copy of Charge at the Office of the Keeper of the Record of Edictal Citations at Edinburgh, to make payment of the foresaid Stipend and Communion Element Money, each of them for his or her own part and portion thereof, conform to the Division and Locality inserted in the great decerniture of the foregoing Decreet, and that at the terms of payment therein expressed—all in terms and to the effect contained in the Decreet and Extract above written, and here referred to, and held as repeated *brevitatis causa*; and that to the Reverend _____ now Minister of the Parish of _____ within ten days, if within Scotland, and if furth thereof, within sixty days after they are respectively charged to that effect, under pain of Poinding, the terms of payment being always first come and bygone; And also Grant Warrant to Arrest the foresaid Defenders' readiest Goods, Gear, Debts, and Sums of Money, in payment and satisfaction of their respective portions of the aforesaid Stipend and Communion Element Money; and if the said Defenders fail to obey the said Charge, then after the said Charge is elapsed, to Poind their readiest Goods, Gear, and other effects; and if needful for effecting the said Poinding, Grant Warrant to Open all shut and lockfast places, in form as effeirs.—Given at Edinburgh, the _____ day of _____ One thousand nine hundred and _____

Statutory
Rules and
Orders, 1925,
No. 1060
S. 69.

TEINDS, COURT OF, SCOTLAND.

PROCEDURE.

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446. ACT OF SEDERUNT UNDER SECTION 41 OF THE CHURCH OF SCOTLAND (PROPERTY AND ENDOWMENTS) ACT, 1925 (15 & 16 GEO. V. c. 33) RESPECTING RE-ALLOCATION OF DEFICIENCY OF STIPEND CAUSED BY SURRENDERS.
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EDINBURGH, 15th July, 1925.

WHEREAS it is provided by the Act 15 & 16 Geo. V. c. 33, section 41, that section 106 of the Court of Session (Scotland) Act, 1868, 31 & 32 Vict. c. 100 (which relates to Acts of Sederunt), shall, for the purposes of Acts of Sederunt relating to the Court of Teinds, have effect as if references to that Act in the section included reference to the Act 15 & 16 Geo. V. c. 33, and whereas it is, *inter alia*, enacted by the said Act 31 & 32 Vict. c. 100, section 106, that the Court of Session may from time to time make such regulations by Act of Sederunt for altering the course of proceeding thereinbefore prescribed in respect to the matters to which that Act relates, and whereas it is provided in paragraph 8 of the Sixth Schedule of the said Act 15 & 16 Geo. V. c. 33, that in certain cases the deficiency of stipend caused by a surrender shall be re-allocated among the heritors in the parish (if any) who have unexhausted teinds not yet allocated for stipend, the Lords of Council and Session hereby Enact and Declare that:—

1. Any claim under said paragraph 8 of the Sixth Schedule to have a deficiency of stipend re-allocated among those heritors in the parish (if any) who have unexhausted teinds not yet allocated for stipend shall be disposed of either in a depending process of locality relative to the said parish or in the proceedings for adjustment of the teind roll thereof.

2. The notification which the Clerk of Teinds is required by said paragraph 8 to make to the common agent of the heritors shall be given in such depending process or in the proceedings for adjustment of the teind roll, as the case may be.

3. In the application of paragraph 8 to the case of a depending process of locality it shall not be necessary for the Clerk of Teinds to issue any certificate specifying the amounts of stipend payable by the heritors whose teinds

are affected by the re-allocation. Said re-allocation shall be made in the interim or final locality, as the case may be.

And the Lords Appoint this Act to be entered in the Books of Sederunt and to be printed and published in common form.

J. A. CLYDE, *I.P.D.*

TEINDS, COURT OF, SCOTLAND.

PROCEDURE.

Statutory
Rules and
Orders,
No. $\frac{1098}{s. 73}$.

ACT OF SEDERUNT FOR REGULATING THE PROCEDURE RELATING TO THE PREPARATION, ISSUING, ADJUSTMENT AND CUSTODY OF TEINDS ROLLS UNDER THE CHURCH OF SCOTLAND (PROPERTY AND ENDOWMENTS) ACT, 1925 (15 & 16 GEO. V. c. 33). 369, 436, 534.

EDINBURGH, 28th October, 1925.

THE LORDS OF COUNCIL AND SESSION, in pursuance of the powers vested in them by the Act of Parliament 15 & 16 Geo. V. c. 33, entitled "An Act to amend the law relating to Teinds and to the Stipends of Ministers of the Church of Scotland and the tenure of the Property and Endowments of that Church, and for purposes connected therewith," Enact and Declare as follows, viz. :—

1. A teind roll of a parish shall be prepared on application to the Court of Teinds by Petition at the instance of the Church of Scotland General Trustees.

2. The Petition may be presented at any time after the date of standardisation of the stipend of the parish provided that—

- (a) a final decree of locality following upon any application for an augmentation of stipend under section 10 of the foresaid Act has been pronounced; or
- (b) the time within which proceedings under section 10 (2) of the foresaid Act may be taken has expired; or
- (c) the General Trustees state in the Petition that it is not intended to make any application under section 10 of the foresaid Act.

3. The Petition may be in the form of the Schedule hereto annexed.

4. All Petitions shall be enrolled in the Teind Motion Roll of the Lord Ordinary for an order for intimation. It shall be sufficient intimation to all parties concerned that a copy of the Petition be affixed to the most patent door of the church of the parish to which the application applies on two successive Sundays before the diet of public worship on each of these days, and a notice intimating the Petition be inserted in the *Scotsman* newspaper, and in a newspaper circulating in the county in which the parish referred to in said notice is situated, once a week for two successive weeks in each of such newspapers, provided always that the Lord Ordinary may make such other or further order regarding intimation as he may consider to be necessary or expedient in the circumstances of the case.

5. After the period of intimation ordered by the Lord Ordinary has expired, the Petition may be enrolled for an order as follows, viz. :—

(a) *If a state of teinds has been lodged with the Clerk of Teinds by the titulars or heritors, for a remit to the Clerk to prepare a teind roll.*

(b) *If no state of teinds has been so lodged (and unless an application under paragraph 6 hereof shall be granted), for an order on the heritors to meet and choose a common agent, and to lodge a state of teinds within a time to be specified in such order, and upon such state of teinds being lodged for a remit to the Clerk to prepare a teind roll.*

6. On enrolment under paragraph 5 hereof, the petitioners or any heritor or titular may apply by motion to dispense with the appointment of a common agent and also (if the circumstances justify that course) with the preparation and lodging by the heritors of a state of teinds.

7. In any case in which application is made to dispense with the appointment by the heritors of a common agent the Lord Ordinary may by interlocutor make such orders with regard to the conduct of the process as he may think just and expedient, and may require as a condition of granting the application that the party applying shall make such provision as to the Court may appear just and sufficient for the payment of the fee fund dues, including the expense of preparing the teind roll.

8. In any case in which the preparation and lodging of a state of teinds by the heritors is dispensed with, the Lord Ordinary shall remit to the Clerk of Teinds to prepare and

lodge a teind roll according to the state of the teinds as disclosed in the last locality process.

9. The procedure for the appointment of a common agent shall be the same *mutatis mutandis* as for the appointment of a common agent in a process of locality.

10. After the teind roll has been prepared the clerk shall print and report the same to the Lord Ordinary, who shall take the roll into consideration and shall make such order as he shall think fit with respect to intimation of the roll by advertisement or on the church door or otherwise (including where necessary an order on the heritors for the appointment of a common agent in the event of such appointment having been formerly dispensed with).

11. The teind roll shall be retained in the hands of the clerk subject to inspection by any party interested, and shall not be lent or given out to any person whatsoever. But after the Lord Ordinary has made an order for intimation printed copies may be supplied to the common agent for distribution among the heritors, and where there is no common agent to any heritor who applies.

12. The Lord Ordinary shall either hear parties *viva voce* upon such objections as may be lodged within eighteen months after the order for intimation of the teind roll, and upon any answers that may be made thereto at the Bar; or he may, if he shall see cause, allow all concerned to give in written answers to such objections within such time as he shall think proper to appoint, and shall thereafter proceed, in so far as regards any application for prorogating the time for giving in papers, in the manner directed by section 12 of the Court of Session Act, 1825. ^{6 Geo. IV. c. 120.}

13. After (a) the objections (if any) to the teind roll have been disposed of by the Court and (b) any extra-judicial surrenders of teind made before the passing of the said Act 15 & 16 Geo. V. c. 33, have been intimated, and evidence thereof produced, to the clerk (which shall be done before the expiry of six months after the date of the order for intimation of the teind roll), and (c) any surrenders of teind made in accordance with the provisions of the Sixth Schedule of the said Act 15 & 16 Geo. V. c. 33, have become effectual, and (d) intimation has been received by the clerk claiming that the deficiency of stipend caused by any such surrenders shall be re-allocated among the heritors in the parish who have unexhausted teinds not yet allocated for stipend, and (e) objections, if any,

of any heritor to such re-allocation have been disposed of by the Lord Ordinary, a remit shall be made to the clerk to amend the roll, and if, in virtue of the amendments, the Lord Ordinary shall deem it necessary, he may order the clerk to reprint the roll as amended before declaring the roll to be final.

14. After the Lord Ordinary has by interlocutor declared the roll to be final he shall, where a common agent has been appointed, direct that an account of the expenses incurred to the common agent be lodged in process, and when lodged remit the same to the auditor to tax and report; and after approving of such report, shall grant decree against the heritors in favour of the common agent for the taxed amount of the expenses as approved, and for the expense of extracting the decree and proportioning the same in accordance with a scheme of apportionment thereof prepared by the clerk in terms of the provisions of section 11 (3) of the said Act 15 & 16 Geo. V. c. 33.

15. Except in the cases specified in the said Act 15 & 16 Geo. V. c. 33, in which the finding or judgment of the Lord Ordinary is declared to be final, any judgment of the Lord Ordinary may be submitted to review by the Division to which the cause belongs by giving in a Note, which must be lodged within twenty-one days after the date of the finding or judgment complained of, and the procedure on that Note shall be the same as in reviewing judgments of a Lord Ordinary in the Court of Session.

16. The clerk shall, on receiving notice of any change of ownership of the lands contained in one entry in the teind roll in respect of which lands a standard charge has been constituted in accordance with the provisions of section 12 of the said Act 15 & 16 Geo. V. c. 33, insert in the teind roll the name of the new proprietor as stated in said notice; such notice may be in the form of Schedule A annexed to the Act 37 & 38 Vict. c. 94, provided always that notice of change of ownership of part only of an entry in the teind roll shall be given effect to by the clerk only where the provisions of section 13 of the said Act 15 & 16 Geo. V. c. 33, are complied with in said notice.

17. Where a standard charge has been constituted on the lands of any heritor in terms of the provisions of section 12 of the said Act 15 & 16 Geo. V. c. 33, and the same has been redeemed in accordance with the provisions of that section, or where a stipend exigible from the teinds of any lands of a heritor has been redeemed in accordance with the provisions of section 14 of the last-mentioned Act, the

clerk shall, on receiving notice in writing of such redemption signed on behalf of the General Trustees and the owner of the lands the standard charge on which has been redeemed, or of the lands the stipend in respect whereof has been redeemed, make an entry to that effect in the teind roll.

18. An excerpt from a teind roll of any entry or entries therein certified by the Clerk of Teinds shall be received in any Court of Law as sufficient evidence of such entry or entries.

And the Lords Appoint this Act to be inserted in the Books of Sederunt and to be printed and published in common form.

J. A. CLYDE, *I.P.D.*

SCHEDULE REFERRED TO.

UNTO THE RIGHT HONOURABLE

THE LORDS OF COUNCIL AND SESSION,
COMMISSIONERS FOR THE PLANTATION OF KIRKS
AND VALUATION OF TEINDS.

THE

PETITION

OF

THE CHURCH OF SCOTLAND GENERAL TRUSTEES, 11 & 12
incorporated by the Church of Scotland, (General Trustees) Geo. V.
Order, 1921. C. CXXV.

Humbly sheweth,—

THAT by the Church of Scotland (Property and Endowments) Act, 1925, section 11, it is provided, *inter alia*, that "There shall be prepared by the Clerk of Teinds for every parish in Scotland a Teind Roll specifying in sterling money (a) the total teind of that parish; and (b) the amount of that total applicable to the lands of each heritor; and (c) the value of the whole stipend payable to the minister, so far as payable out of teinds, including vicarage teinds payable as stipend and surrendered teinds so payable; and (d) the proportion of that value payable by each heritor in the parish."

That the stipend[s] of the Minister[s] of the [United] Parish[es] of [] in the Presbytery of [] and County [or Counties] of []

[], became standardised within the meaning of the fore-said Act as at the term of Martinmas 19[], in consequence of the [death, resignation or translation of the Minister, or intimation in terms of section 4 of the said Act by the Minister to the petitioners of his election, or notification in terms of section 5 of the said Act by the petitioners to the Minister and other parties

mentioned in the said section—the particulars and dates should be *shortly stated*].

That the final augmentation in terms of section 10 of said Act has been localled upon the heritors conform to Decree of Locality made final on [*give date*], or That no proceedings are to be taken to obtain an augmentation under section 10 of said Act : or That the Lord Ordinary has pronounced a finding that there is no surplus teind in the parish available for an augmentation under section 10 of said Act : or That the time within which proceedings under section 10 (2) of the foresaid Act may be taken has expired.

That in these circumstances the preparation of a Teind Roll of the Parish[es] of [] should now be proceeded with in terms of section 11 of the said Act.

May it therefore please your Lordships to appoint this Petition to be intimated to all parties concerned by affixing a copy thereof to the most patent door of the church of the said parish[es] on two successive Sundays before the diet of public worship on each of these days, and by inserting a short notice thereof in the Scotsman newspaper and in [another newspaper circulating in the county in which the said parish(es) [are] situated] once a week for two successive weeks, or in such other or further form and manner as to your Lordships may seem proper; to appoint the heritors of the said parish[es] of to meet and choose a common agent; to appoint said heritors to lodge a State of Teinds; to remit to the Clerk of Teinds to prepare a Teind Roll in terms of said Act 15 & 16 Geo. V. c. 33, and upon the Teind Roll being reported to your Lordships, and after considering the same with any Objections and any Answers thereto and along with any Surrenders of Teinds that may be duly made, to adjust and complete said Roll, and to declare the same to be a Final Teind Roll.

According to Justice, etc.

APPENDIX IV.

MISCELLANEOUS.

(i) WARRANT UNDER THE ROYAL SIGN MANUAL 150.

APPOINTING

THE SCOTTISH ECCLESIASTICAL COMMISSIONERS

TO ACT UNDER

THE CHURCH OF SCOTLAND (PROPERTY AND
ENDOWMENTS) ACT, 1925.

GEORGE THE FIFTH, by the Grace of God of
the United Kingdom of Great Britain and
Ireland and of the British Dominions beyond
the Seas, King, Defender of the Faith,

TO

Our Trusty and well-beloved JOHN WILSON,
Esquire (commonly known as the Honourable
Lord Ashmore), one of the Senators of Our
College of Justice in Scotland:

Our Trusty and well-beloved JAMES BROWN,
Esquire, Commander of Our Most Excellent
Order of the British Empire:

Our Trusty and well-beloved ROBERT CANDLISH
HENDERSON, Esquire, Master of Arts, Bachelor
of Laws, one of Our Counsel learned in the law:

Our Trusty and well-beloved CHARLES KER,
Esquire, C.A., and

Our Trusty and well-beloved SIR KENNETH JOHN
MACKENZIE, Baronet:

WHEREAS provision is made under the Church of Scotland
(Property and Endowments) Act, 1925, for the appoint-
ment by Us of not more than five persons to be Commis-
sioners under the Act, who shall be styled the Scottish
Ecclesiastical Commissioners, and for the appointment of
one of the said Commissioners, being a person who holds
or has held judicial office, as Chairman.

NOW KNOW YE that We, in pursuance of the powers
vested in Us by the said recited Act, reposing great trust
and confidence in your knowledge, discretion, and ability,

had nominated, constituted, and appointed, and do by these presents nominate, constitute, and appoint you, the said John Wilson, James Brown, Robert Candlish Henderson, Charles Ker, and Sir Kenneth John Mackenzie, to be Scottish Ecclesiastical Commissioners during Our Pleasure for the purposes of the Church of Scotland (Property and Endowments) Act, 1925.

And We do further appoint you, the said John Wilson, being a person who holds judicial office, to be Chairman of the said Commission.

Given at Our Court at BALMORAL, this Twenty-second day of *September*, 1925, in the Sixteenth year of Our Reign.

BY HIS MAJESTY'S COMMAND,

(Sgd.) JOHN GILMOUR.

(ii) SYNOPSIS OF RIGHTS AND DUTIES OF HERITORS

ARISING UNDER

THE PROPERTY AND ENDOWMENTS ACT

AND

RELATIVE ACTS OF SEDERUNT.

Sec. 2, Sch.
II.

1. Under sec. 2 and Schedule II., *inter alios*, "any heritor concerned" may apply to the Clerk of Teinds to fix the former county average value of any kind of victual in which the whole or part of the victual stipend of the parish has been localled which is not mentioned in the First Schedule to the Act; and that whether the value is or is not given in the official returns of fiars prices.

Sec. 2 (2).

2. Under sec. 2 (2), similarly, "any heritor concerned" may at any time before the expiry of six months after the date of standardisation in his particular parish apply to the Sheriff to give such instructions to the Clerk of Teinds as he may deem necessary in regard to any special method of calculation customary in that parish.

Secs. 4 and 5.

3. "The heritors" are among those who have right to receive intimation of election by a minister to standardise under sec. 4, and of notification by the General Trustees of standardisation under sec. 5.

4. Under sec. 8 the heritors become liable for payment Sec. 8. of standardised stipend as from the date of standardisation half-yearly at the terms of Whitsunday and Martinmas as therein provided for.

5. In proceedings for augmentation under sec. 10 of Sec. 10. the Act and relative Act of Sederunt of 17th July, 1925, heritors are among those who must be cited in proceedings for augmentation; and in the course of the process (A.S. 10 (b)) the heritors or their agents will be ordained to meet for the purpose of electing a common agent, and also to produce their rights to their teinds as therein provided for. It is also competent (A.S., sec. 15) to any heritor or heritors the state of whose teinds has been materially altered by decrees of valuation, &c., occurring subsequent to the approval of an interim scheme, to apply for a rectification of the locality under sec. 15. Any Sec. 15. heritors aggrieved by the proposals in the scheme of final locality may give in objections and be heard upon these (A.S., sec. 18).

6. Under sec. 11 (3) the expenses of the preparation, Sec. 11 (3). issue, and adjustment of the teind roll fall to be apportioned among the heritors according to the amount of the total teind applicable to the lands of each heritor; and the amount so apportioned is payable by the heritor concerned, unless his teinds have been valued and surrendered before the date of standardisation, in which case the proportion falling upon that heritor must be borne by the General Trustees.

In carrying out the provisions for the preparation, &c., Sch. V. of teind rolls (Schedule V.), it is provided by sec. 2 of the Schedule that it shall be the duty of "the heritors concerned" upon the occurrence of a vacancy (actual or constructive) "forthwith" to prepare and lodge in the Teind Office a state of teinds, unless in any case the Lord Ordinary shall, on the application of any party, dispense therewith.

A heritor entered in the teind roll separately for different subjects belonging to him in the same parish has right under sec. 5 to have the various entries or some of Sec. 5. them consolidated as provided for in that section, subject to his applying for before the teind roll is made final.

Under sec. 7 the heritors may be appointed to nominate Sec. 7. a common agent for the purposes of the proceedings.

For the various minor stages at which heritors may interpose in the course of this procedure, reference is made to the Act of Sederunt of 28th October, 1925 (*supra*, Appendix, p. 613).

- Sec. 12. 7. Under sec. 12 a heritor liable in stipend or standard value the amount of which exigible from the teinds comprised in one entry in the teind roll exceeds £1 is liable in payment of the standard value thereof as a standard charge after the first term occurring after the teind roll has become final; and he is entitled to redeem the standard charge as provided for in sec. 12; and to allocate the same as provided for in sec. 13; and in the case of allocation resulting in a portion of the standard charge not exceeding £1 he becomes bound to redeem the same.
- Sec. 13.
- Sec. 14. 8. Similarly, a heritor liable in payment of stipend or a standard value exigible from his teinds comprised in one entry which does not exceed £1 is bound to redeem the liability as provided for in sec. 14.
- Sec. 15. 9. The liability of a heritor for the standard value of stipend the amount of which exigible from all his lands in the parish does not exceed a sum of 1s. per annum is extinguished by sec. 15.
- Sec. 16 and Sch. VI. 10. A heritor whose teinds are unvalued may, under sec. 16 and Schedule VI., apply not later than twelve months from the issue of the teind roll to the Sheriff for the appointment of a valuator to value his teinds. The matters to be attended to in the course of the process of valuation and the rights emerging upon valuation, of surrender, and otherwise are detailed in the Sixth Schedule.
- Sec. 17. 11. The heritor of any lands from the teinds of which stipend is exigible has right under sec. 17 to deduct the standardised stipend, or corresponding standard charge, from the teinds in a question with the titular, whether such stipend or standard charge has or has not been redeemed or extinguished.
- Sec. 27. 12. Under sec. 27 the duty rests upon heritors to implement any contract or agreement in regard to the repair, &c., of buildings which was entered into by them prior to 1st February, 1925; and they remain liable for, and entitled to take part in the levying of assessments to meet any expenditure incurred in connection therewith.
- Sec. 28. 13. Under sec. 28 heritors concerned have certain important rights, viz.—(a) To come to an agreement with the General Trustees as to repairs upon the ecclesiastical buildings or the sum of money to be paid in lieu thereof; (b) failing agreement, they are liable to be ordered by the Sheriff to execute repairs in terms of the section; (c) upon satisfaction of the obligations in regard to buildings, any heritor concerned has right to apply for a certificate in

terms of Schedule XI. to the Act; (d) upon registration Sch. XI. of the certificate, heritors become freed from any liability or obligation in connection with the subject to which the certificate relates; (e) as a "person concerned" a heritor may apply to the Sheriff for a finding that a particular case should be dealt with by the Commissioners under sec. 28 (4); (f) the heritors are liable for the assessments incidental to operations under sec. 28, and are entitled to the reliefs therein provided for.

14. On the expiry of one year from the date of the Sec. 29. transfer of any church any existing rights in the heritors to seating accommodation in the transferred church ceases.

15. Under sec. 30 provision falls to be made in any order Sec. 30. of the Commissioners relative to glebes for implement by the heritors of any obligations incumbent upon them so far as not already implemented; and under sec. 30 (3) (f) a heritor or heritors concerned may redeem on terms to be agreed upon with the General Trustees, or, failing agreement, to be fixed by the Commissioners, any right of pasturage over any lands which is possessed by the minister as minister of the parish.

16. Under sec. 37 a heritor or heritors whose lands Sec. 37. adjoin any glebe which the General Trustees desire to dispose of by selling or feuing, the same is entitled to an opportunity to purchase or take the same on feu at a price or feu-duty to be fixed by agreement, or, failing agreement, by an arbiter appointed by the Sheriff.

17. Under sec. 40, where in any parish manse mail is Sec. 40. payable at the passing of the Act in lieu of a manse, the heritors legally liable in payment thereof must redeem the same by payment to the General Trustees of a sum equal to twenty times the actual amount, such redemption payment to be made within five years after the passing of the Act.

18. Under sec. 45 the benefit is reserved to any heritor Sec. 45. of any obligation existent in his favour for relief of stipend, such obligation being extended to cover relief of standard charge, &c.

HERITORS' CLERKS.

Under sec. 44, it is a duty of the clerk to the heritors Sec. 44. of any parish, where the obligations incumbent upon the heritors in regard to matters dealt with by the Act have been extinguished, to make intimation thereof to the Secretary of State for Scotland. (See *supra*, Appendix, pp. 113-114.)

(iii) LETTER ISSUED BY THE SCOTTISH OFFICE TO
THE CLERKS TO THE HERITORS OF THE
VARIOUS PARISHES IN SCOTLAND.

114, 121.

SCOTTISH OFFICE, WHITEHALL,
1st February, 1926.

Sir,

Church of Scotland (Property and Endowments) Act, 1925.

*Preservation and Permanent Custody of the Books, &c., of
Heritors.*

I am directed by the Secretary for Scotland to refer to section 44 of the above Act. This section provided that after the Secretary for Scotland has received the statutory intimation from the Clerk to the Heritors of any Parish that the powers and duties of the heritors of the parish have by or in pursuance of the provisions of the Act been extinguished, he may issue directions with respect to the preservation and permanent custody of the books of the heritors, and of such records and documents as are in their possession.

In order to the proper carrying out of the provisions of the section above referred to when the appropriate time arrives, the Secretary for Scotland is anxious to obtain as much information as possible about the books, records, and documents to which the section may apply, and he would therefore be obliged if you would furnish him with a list or inventory so far as relating to your parish, employing in so doing, as far as is possible, the accompanying Schedule.

I am, Sir,

Your obedient servant,

(Sgd.) JOHN LAMB.

To the Clerk to the Heritors of the Parish of

SCHEDULE REFERRED TO.

PARISH,.....

- | | |
|---|-------------------------------------|
| (a) How many heritors' books have you? | (1) Minute books,..... |
| | (2) Account books,..... |
| | (3) Registers of Burials,..... |
| (b) Please give the years covered by | (1) Minute books,..... |
| | (2) Account books,..... |
| | (3) Registers of Burials,..... |
| (c) Have you any lists of heritors with old, valued, or real rent? If so, please give | (1) No. of lists, |
| | (2) No. of heritors in parish,..... |
| (d) Have you any other records, documents, or plans? If so, please give particulars. | |

- (e) Have you any views as to the desirability of retaining any of the foregoing books, documents, or plans, or as to the proper official in the parish to have the custody of them?
- (f) If any of the foregoing books, documents, or plans are not in your possession, please state in whose possession they are.

(iv) NOTE

ON THE

RATING (SCOTLAND) ACT, 1926

(16 & 17 Geo. V. Ch. 47)

AS AFFECTING

LIABILITY OF ECCLESIASTICAL BUILDINGS TO
RATES.

The Rating (Scotland) Act, 1926, which came into operation on 16th May, 1927, has effected a radical change in the method of collection of local rates in Scotland. For collection by the several local bodies charged with different services for providing for the poor, education, public health, &c., each of its own particular rate, it has substituted a single assessing and collecting body—the town council of a burgh or the county council of a county, as the case may be. This becomes the rating authority by which is levied the rates for all purposes in the area. Incidentally, the machinery by which this result has been achieved seems to involve certain consequences affecting exemptions hitherto enjoyed from certain rates in respect of certain ecclesiastical buildings.

The scheme of the first two sections of the Act may be briefly summarised. The parish rates and education rate shall cease to be levied and recovered as hitherto by parish councils, the town council or county council, as the case may be, becoming the rating authority for its particular area for the purposes of all parish rates and the education rate. The parish council is to estimate the amount required for the appropriate expenditure in the case of each of the existing parish rates in manner provided by the Act, and is to certify to the rating authority on or before 15th July yearly the amount falling to be pro-

vided for each rate. The rating authority is then to levy under the appropriate name and within the appropriate area a rate of such amount as is necessary to meet the certified amount, and to collect and recover the rate, the amount recovered being handed over to the parish council for its purposes.

297. Sec. 2, sub-sec. (4), provides that

“ The exemption from payment of the rate for the relief of the poor and of any other rate leviable by reference to the persons liable for that rate possessed and enjoyed by ministers in respect of their manses and glebes shall cease.”

Although the exemption thus enjoyed was in theory a personal privilege inhering in the occupant minister rather than one attaching to the subjects, its effect was to exempt the manse or glebe occupied by a parish minister from poor rates. And the doing away with it in effect renders all manses and glebes liable for the future to be assessed for all local rates like any other subjects.

Secs. 3 and 5 prescribe the manner of levy of the parish and education rates respectively. As their provisions are not distinguishable so far as affecting the subject-matter of this note, it is sufficient to advert to the provisions of sec. 3. Under this section “ the rate for the relief of the poor and all other rates leviable in like manner as that rate ” shall cease to be levied or recovered in accordance with the provisions of the Poor Law (Scotland) Act, 1845, and shall, subject to the provisions of the Act of 1926, be levied and recovered by the rating authority “ in like manner, at the same time and under the like powers and provisions . . . as, but as separate rates from, the public health general assessment, but the limit, if any, applicable to that assessment shall not apply ” (sec. 3 (1)).

The net result of secs. 3 (1) and 5 is to make the determinant factor in regard to the rates hitherto collected for parish and educational purposes the manner of collection of the public health general assessment in the particular area. This varies according to whether the area is burghal or landward. It is convenient to deal with the former first, as in regard to it the effect of the Act upon exemption affecting certain ecclesiastical buildings has already arisen sharply for determination. In regard to burghs, the public health general assessment is governed by sec. 136 of the Public Health Act, 1897, under which it falls to be levied in like manner and under the like powers (save as regards limit) as the general improvement rate under the Burgh Police (Scotland) Act, 1892, or where there is no such rate, by rate levied in the like

manner. Except in burghs having a local Act, the levying of this rate is governed by sec. 359 of the Burgh Police Act, 1892, under which the rate is charged in equal proportions upon all owners or occupiers of lands within the burgh. Sec. 373 of the Burgh Police Act, however, provides that no assessment authorised by the Act shall be imposed upon any lands or premises exempt by Act of Parliament from any corresponding assessment authorised to be imposed by the General Police Acts or the local Acts respectively applicable to certain named burghs.

In the carrying out of these provisions in the case of 89. Glasgow, a question affecting a large number of ecclesiastical buildings presented itself. It will be observed that the rates leviable under the Act of 1926 are to be charged in like manner as the public health general assessment, which, in the case of burghs, is to be charged in like manner as the general improvement rate. This, in Glasgow, is chargeable under its own local Police Act, subject to the exemption provided under sec. 373 of the Burgh Police Act, which is adopted by Glasgow, and is part therefore of its local code. Under this there exists a limitation provided for by sec. 39 of the Glasgow Police Act, 1866, providing that the Corporation shall not impose any police assessments "in respect of any place used solely for public worship or any building which is occupied solely for the purposes of religion or public charity."

A number of halls attached to churches of various denominations throughout Glasgow had under this provision for long enjoyed exemption from the general improvement rate or other similar rate leviable in the like manner. And as the public health general assessment fell under the same rules, the exemption extended to it. It is to the conditions affecting the collecting of this last rate that those for the future to be applied by the rating authority to the collection of the parish and education rates have been assimilated. But this assimilation is subject to a provision contained in sec. 3 (2) of the Rating Act, 1926, to the following effect:—

"Where under the provisions of any local Act the public health general assessment is not exigible in respect of any lands and heritages, then, notwithstanding anything in this section or in sec. 5 of this Act, the rates to which these sections apply shall nevertheless be levied and recovered in respect of such lands and heritages in the same way and to the same effect as if the public health general assessment had been exigible in respect thereof."

In carrying through the rating for the first year after the coming into operation of the new Act, the assessor for Glasgow proceeded to deal with the church halls in question upon the footing that, although exempt as hitherto from municipal rates, they were, by virtue of the provision just quoted, excluded from exemption from poor and other parish rates and from education rates. The question affected some 500 such halls, the amount of assessment involved—owners and occupiers combined—being in the region of £6000. In September, 1927, the rating authority for the city of Glasgow, acting under the Act of 1926, had issued a demand on, *inter alios*, the occupiers of the hall of Queen's Park West United Free Church (which was selected afterwards as a test instance) for payment of £3 10s. 6d. as occupiers' local rates. Against this objections were duly lodged with the surveyor of rates for the city. On 27th September a sub-committee of the Corporation Committee on Assessments heard the objections, and, after consideration, found that the premises were exempt from municipal rates in respect that they were solely occupied for the purposes of religion or public charity. *Quoad ultra* it dismissed the objections, thus leaving the objectors subject to the parish poor and education rates for the hall. Against the latter part of this finding an appeal was taken, which came before the Sheriff of Lanarkshire (A. O. M. Mackenzie, K.C.).¹ It was a matter of agreement between the parties to the appeal that the hall in question (and the other 500 or thereby in the city for which the case was to be regarded as a test) was occupied solely for the purposes of religion or public charity, and therefore fell within the exemption in the local Police Act of 1866. The Sheriff, in the result, refused the appeal and confirmed the decision of the Corporation Committee. In view of the importance of the issues involved, it is convenient to give the reasons for the judgment as these are stated by the Sheriff in his note, which is to the following effect:—

“The question raised by this appeal is whether the appellants, as occupiers of the hall attached to the Queen's Park West United Free Church, are liable for payment of poor and education rates. It is admitted for the purposes of the appeal that the hall in question is occupied solely for the purposes of religion or public charity. A number of statutory provisions were referred to in the course of the debate, and it is necessary for an appreciation of the point at issue to refer to the following:—By the first section of the Rating (Scotland) Act, 1926, it was enacted that parish rates should cease to be levied by parish councils, and, subject to the

¹ 44 Sh.Ct.Rep. 13.

provisions of the Act, should be levied and collected by the town council of the burgh and the county council of the county, as the case might be; and by sub-sec. (1) of sec. 3 of the said Act it was enacted that 'The rate for the relief of the poor and all other rates leviable in like manner as that rate, whether leviable by parish councils or by any other authority, shall cease to be levied in accordance with the provisions of the Poor Law (Scotland) Act, 1845, and shall, subject to the provisions of this Act, be levied and recovered by the rating authority in like manner at the same time and under the like powers and provisions . . . as, but as separate rates from, the public health general assessment, but the limit, if any, applicable to that assessment shall not apply.'

"The education rate is a rate leviable in like manner as the rate for relief of the poor, and the effect accordingly of sec. 1 and sec. 3, sub-sec. (1), of the Rating (Scotland) Act, 1926, is that from and after the date on which that Act became operative the poor and education rates are to be levied in Glasgow by the Corporation of the city under the like powers and provisions as the public health assessment. It is necessary, therefore, to ascertain how the public health assessment is levied in the city, and the provisions relating to that assessment are contained in sec. 136 of the Public Health (Scotland) Act, 1897. That section enacts as follows:—'With respect to burghs subject to the provisions of the Burgh Police (Scotland) Act, 1892, or having a local Act for police purposes, all charges and expenses incurred by or devolving on the local authority in executing this Act, or any of the Acts hereby repealed and not recovered as hereinbefore provided, may be defrayed out of an assessment (in this Act referred to as the public health general assessment) to be levied by the local authority along with but as a separate assessment from the assessment hereinafter mentioned; that is to say, the said assessment shall be assessed, levied, and recovered in like manner and under the like powers, but without any limit, except as in the immediately succeeding section provided, as the general improvement rate under the Burgh Police (Scotland) Act, 1892, or, when there is no such rate, by a rate levied in like manner as the general improvement rate under the last-mentioned Act.'

"The reference in the above section to the Burgh Police Act makes it necessary to refer to secs. 359 and 373 of that Act. By sec. 359 it is enacted that, whenever the Commissioners in any burgh shall resolve to make provision for the general improvement of the burgh, it shall be lawful for them to charge, in equal proportions, all owners and occupiers of lands within such burgh with a special assessment not to exceed a certain amount, and to

be called ' the general improvement rate ' ; and by sec. 373 of the same Act it is provided that no assessment authorised by the Act shall be imposed on any lands or premises exempt by Act of Parliament from any corresponding assessment authorised to be imposed by the general Police Acts or the local Police Acts respectively applicable to the burghs named in Schedule II. of the Act.

" Glasgow is one of the burghs named in Schedule II. of the Act, and the Corporation of the city has adopted sec. 373 of the Burgh Police Act, 1892, but has not adopted sec. 359. The rate authorised by the last-mentioned section is accordingly not levied in Glasgow, but by sec. 39 of the Glasgow Police Act, 1866, the Corporation is empowered to impose ' the police assessment ' on occupiers of lands and heritages within the city, and the same section provides that the Corporation shall not impose any assessment in respect of any place used solely for public worship, or any building which is occupied solely for the purposes of religion or public charity.

" As already stated, the appellants' church hall is admittedly occupied solely for such purposes, and it was conceded by counsel for the respondents that if sub-sec. (1) of sec. 3 of the Rating (Scotland) Act, 1926, had stood alone, the appellants would, as occupiers of the hall attached to their church, and in virtue of the statutory provisions to which I have referred, in particular sec. 39 of the Glasgow Police Act, 1866, and sec. 373 of the Burgh Police Act, 1892, have been entitled to the exemption from poor and education rates which they claim; but it was argued by him that their claim for exemption was excluded by the terms of sub-sec. (2) of sec. 3 of the Act of 1926. This sub-section enacts that ' Where under the provisions of any local Act the public health general assessment is not exigible in respect of any lands and heritages, then, notwithstanding anything in this section or in sec. 5 of this Act '—(that being the section dealing with the education rate)—' the rates to which those sections apply shall nevertheless be levied and recovered in respect of such lands and heritages in the same way and to the same effect as if the public health general assessment had been exigible in respect thereof.' The contention of the respondents is that, in terms, that section excludes the applicants' claim for exemption.

" The contrary argument submitted for the appellants is that the sub-section is only intended to apply to the case where under any local Act the public health general assessment is not leviable in a local authority's district. On that contention I would make two observations—first, that I was referred to no local Act providing that the public health general assessment was not to be leviable within the local authority's district; and, second, that the

construction which the appellants seek to put upon the sub-section appears to me to be unnatural. If the sub-section had been intended for the purpose suggested by the appellants, the natural mode of expressing the intention of Parliament would have been to enact that 'Where under the provision of any local Act the public health general assessment is not leviable in the district of the local authority'—and to proceed then in the terms in which the remainder of the section is expressed.

"But the phraseology of the section appears to me to be entirely appropriate to express the meaning put upon it by the respondents' committee—that is to say, that the enacting words of the section are to apply where under the provisions of any local Act any lands and heritages are exempt from the public health general assessment. I accordingly agree in the construction which counsel for the respondents put upon the second sub-section of sec. 3 of the Act of 1926, and I am of opinion that it excludes the appellants' claim to exemption for payment of poor and education rates as occupants of the hall in question."

It will be observed that this decision is governed by considerations determined by the special conditions of Glasgow local legislation. The exemption from rates pleaded as applying to the buildings in question was one contained in a local Act applicable to Glasgow, and therefore the case decides nothing which would displace the application of any exemption from rating existing under any general public statute in any burgh. Still less is it directly applicable to the rating of similar buildings situated in non-burghal areas, in which the provisions governing the public health general assessment are quite different from those with respect to burghs. But, looking to the large area of Glasgow and the number of buildings affected by it, the judgment is one of considerable importance, quite apart from the consideration that its principle will cover many similar cases in other burghs in which there exist provisions for an exemption from local rates under local Acts in favour of similar buildings.

This being so, it is important to note carefully the limitations of the judgment, even within the area to which it applies. In the first place, as is above observed, its principle does not touch any exemption under the provisions of a public general statute. It therefore appears to leave unaffected the provision of the Act of 1874 (37 & 38 Vict. c. 20), under which it was provided that "no assessment or rate under any general or local Act of Parliament for any county, burgh, parochial or other local purpose whatever shall be assessed or levied upon, or in respect of any church, chapel, meeting-house, or premises in Scotland exclusively appropriated to public religious

worship . . . provided also that such exemption shall continue although such church, chapel, meeting-house, or other premises or any room belonging thereto, or any part thereof, may be used for Sunday or infant schools or for the charitable education of the poor." It need not be apprehended, therefore, that the liability for parish and education rates affirmed in Sheriff Mackenzie's judgment could be extended to the case of churches proper. It will be observed that in the case of the halls in question the admission did not go so far as to meet the terms of the Act of 1874, under which the use must be exclusive appropriation to public religious worship, which may, however, include Sunday or infant schools or charitable education of the poor. In the test case the admission was only that the occupation was solely for the purposes of religion or public charity. It may, therefore, very well be that there are, even in Glasgow, church halls which can effectually claim the benefit of exemption, because in fact their use is confined within the limits envisaged in the Act of 1874,² for this exemption being under a public general, and not a local, Act is not struck out by sec. 3 (2) of the Act of 1926.

In the case of counties, the public health general assessment rate is, under sec. 135 of the Public Health Act, 1897, to be levied in like manner as the assessment for the maintenance of roads under the Roads and Bridges Act, 1878, or where there is no such assessment in the like manner as an assessment for that purpose might have been levied under that Act. Under the Roads and Bridges Act, 1878, sec. 52, the amount of the assessment in question fell to be levied by assessments imposed by the Trustees at a uniform rate on all lands and heritages within the district, to be paid half by the proprietor and half by the tenant or occupier of the lands or heritages upon which the same was imposed, subject to certain exceptions which do not affect the present question. The machinery of levy has been modified by the provisions for a consolidated rate under the Local Government Act, 1889. In regard to counties, therefore, the matter is not complicated by the introduction of exemptions under local Acts, but stands upon the general provision of the Act of 1874, the effect of which depends upon the limitation of the occupation of the buildings in respect of which the exemption is claimed, as is explained above. Generally speaking, it will secure exemption for all churches, and also for halls, provided the use of these be limited to the purposes defined in the Act of 1874.

The effect of the Act of 1926 upon the rating of manse and glebes has been already explained above.

² See cases discussed in the text, pp. 88 and 89, and 131.

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